

SOCIAL ENGINEERING THE LEGAL PHILOSOPHY OF ROSCOE POUND

BY

LINUS J. McMANAMAN, O.S.B., Ph.L.

A DISSERTATION

Presented to the Faculty of Letters
University of Fribourg, Switzerland

First Reader:

Rev. A. F. Utz, O.P., Ph.D.

Second Reader:

Rev. I. M. Bochenski, O.P., Ph.D.

In Partial Fulfillment for the Degree of
Doctor of Philosophy
1953

THE ABBEY STUDENT PRESS, ATCHISON, KANSAS

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PREFACE

In a Preface a writer is given an opportunity to express his gratitude to all those who have assisted in completing a work. Adequately to express my thanks would require a volume larger than the present one. However, since this would be impossible I take this occasion to express in a very brief way my gratitude to those without whose help this work could never have been brought to completion.

My thanks are first of all extended to my superior, the Rt. Rev. Cuthbert McDonald, O.S.B., and the community of St. Benedict's Abbey for making this opportunity possible to me. Next I must thank Father A. F. Utz, O.P., professor of philosophy at the University of Fribourg, Switzerland, whose patient direction and assistance made this study possible.

In preparing the first copy for presentation to the faculty of philosophy at the university I received invaluable clerical help from Mr. Joseph Hungerbuehler, Fraulein Elizabeth Rahardt and Mrs. Woitek Nowaczynski (nee Beverly Cook). The time and effort they freely gave in typing copy is deeply appreciated. In preparing copy for printing I received many helpful suggestions from Father Gervase Burke for which I am grateful. Miss Marguerite Brentano donated many hours typing copy for the printers; for this I must render my thanks.

Last, but certainly not least, I owe thanks to Dean Roscoe Pound. This work was prepared while attending school in Switzerland where access to all the necessary books was difficult. Dean Pound very graciously assisted by sending some copies of books and articles to Father Utz and by offering valuable suggestions. If this writer does not entirely agree with Dean Pound's legal theories I feel confident that he will accept the fact in the spirit of friendly criticism and desire to learn which has characterized all his works.

Finally, while offering thanks to all who have assisted me and giving credit to those who have contributed to what is of value in this work, the present writer must accept the responsibility for all shortcomings found herein.

INTRODUCTION

This treatise is a presentation of the legal philosophy of a man who is without question the most influential among contemporary American jurists. The purpose is not, however, simply to summarize his theory for its own sake, but rather, to seek how we may make the traditional natural law an effective force in contemporary jurisprudence.

Among American jurists as well as among those of the rest of the world there is a noticeable interest in natural law. Many are calling for some ultimate principles of law to halt the onward march of pragmatism and its natural offspring, legal realism. But, unhappily, they are not looking for a natural law in the traditional Thomistic sense, a natural law that is binding even in the absence of all positive disposition. Rather they are seeking an ideal picture of law to serve as a norm for the elaboration of positive law.

The present author, whose works we survey, is an example of those who see philosophy and natural law only as something to come to the rescue to fill lacunae in the positive law, or to serve as *post factum* critique of the established law. The traditional meaning of natural law has been lost, and scholastic philosophers are not without fault. Too often natural law has been rejected by jurists outside of Thomistic schools because it has not been properly presented. There is a task for scholastics of guarding against being deserving of the criticism directed at the contemporary *received* natural law, and of entering into the arena with our contemporaries to confront them with the true natural law tradition.

It is beyond the scope of this treatise to present a complete survey of Thomistic natural law. But in reviewing the legal theory of Roscoe Pound we may see where scholasticism may become an effective force. In Part I, in the explanation of his theory, we see that modern pragmatism in law developed and prospered at least partially as a reaction against a pseudo natural law philosophy. In the contemporary revival of natural law we must be on guard against the reappearance of such false theories. In Part II, in the examination of the intellectual fonts from which Pound draws his

material, we see that, although he is essentially pragmatic, he is also very much an eclectic, drawing his material from the most diverse sources. Here we are presented with the possibility of making natural law an effective force even within the framework of pragmatism. Finally, in Part III, a critique, we see that Pound distorts traditional scholastic philosophy of law, but in all probability he does so because it was never properly presented to him.

In presenting the works of Pound there is a particular difficulty resulting from his disregard for logic and his tendency to surround his statements with so many conditional and qualifying observations that it is difficult to find a clean-cut definite proposition. This may well result in misrepresentation and a consequent unfairness. Aware of this danger, we yet undertake an analysis of Pound's legal theory.

PART I
POUND HIMSELF

CHAPTER I
POUND AND HIS PROBLEMS

It was August 29, 1906, at the Capitol Building, St. Paul, Minnesota, the twenty-ninth Annual Meeting of the American Bar Association. A young, hitherto unheralded, jurist and professor from the University of Nebraska shocked the assembled jurists into attention and divided the group into two camps with a paper entitled, *The Causes of Popular Dissatisfaction With the Administration of Justice*.¹ It was in this way that Roscoe Pound launched the most brilliant career in American jurisprudence, or perhaps, in all contemporary jurisprudence.

In the assembly at this meeting there was on the one side the 'old guard' who felt that there was no popular dissatisfaction, or, granting that there may have been a little, they claimed that it was without reason. On the other side was the *avant garde* who lined

¹ "The Causes of Popular Dissatisfaction With the Administration of Justice," a reprint of a 1906 address in *Journal of the American Judicature Society*, Vol. XX, (1937), with an introduction by John H. Wigmore.

up with Pound in a demand for better laws, for better and more effective administration of justice. It is not without significance that his first address of national importance was concerned with imperfections in the administration of justice. The task which he undertook, and which he continues with undiminished vigor, is that of improving the administration of justice. It is a task in which, happily for us, he has met with a considerable amount of success.

The St. Paul address may have earned him a number of opponents as well as friends, but it also won him national recognition and an invitation to move from the relative obscurity of the Nebraska school to the more known and more influential Northwestern University Law School in Evanston, Illinois. While there he was instrumental in organizing the National Conference on Criminal Law and Criminology and the *Illinois Law Review*, of which he was editor-in-chief. In 1909 he was appointed to the law faculty of the University of Chicago. He next became Carter Professor of law at Harvard Law School, and in 1916 was elected dean of that school, a position he held until his resignation in 1936. As dean for twenty years of what is usually considered the nation's most influential law school he was in a position to exercise an enormous impact upon the legal profession. This influence was widened in centrifugal circles as more than a generation of students trained under him entered the legal profession, many of them as professors in other schools of law. Upon his resignation from the deanship of Harvard he continued an active life as author, lecturer and teacher, and performed such functions as serving on a commission for the codification of Chinese law. More recently he spent two years in California organizing a new law school at the University of California, Los Angeles, before returning in the fall of 1952 to Harvard.

The importance and influence of Pound can hardly be called into question, but rather than assume it to be known we can cite a few of the many tributes to his erudition. Professor Thomas A. Cowan of Nebraska University credits him with reworking the whole structure of American legal thought.² Professor Paul Sayre of New York University notes that all the rest of the legal scholars have lived off Pound's erudition for more than forty years.³ Professor Edwin

² "A Report on the Status of Philosophy of Law in the United States," *Columbia Law Review*, Vol. L, (1950), p. 1092.

³ Book Review: *Outlines of Lectures on Jurisprudence* in *Harvard Law Review*, Vol. LVII, (1943), pp. 584-585.

W. Patterson finds Pound's influence in jurisprudence an aid in preparing legislation, in predicting legal trends and in interpreting legal literature. He continues that Pound's ideas have become commonplace, a fact that is a tribute to his insight and vision.⁴ Dean Emeritus Albert Kocourek of Northwestern compares him to an Alpine peak towering above all the surrounding landscape.⁵ And, finally, Professor Herbert D. Laube of Cornell finds that the genius of Pound is as penetrating as John Austin's, as illuminating as Henry Maine's, as resourceful as Rodolf von Ihering's and as humanizing as Lester F. Ward's; his influence is more widespread than that of any jurist ever honored by the Roman Empire.⁶ The tribute paid to him on the occasion of his seventy-fifth birthday in 1947 is indicative of his international as well as his American reputation.⁷

Turning now from this brief biographical note⁸ we take up the reasons he saw for the 'popular dissatisfaction with the administration of justice' in order better to understand what he hoped to accomplish. But to understand the problems as he saw them and the solutions he offers we must review, however briefly, the legal and intellectual milieu into which he entered at the turn of the century. The principles of natural law which served as the foundation of American law in its inception, as stated in the Declaration of Independence and the Constitution, and which continued as the dominant force in the formative era of American law from the Revolution to the Civil War, began to decline in importance about the middle of the last century. By the end of the century its importance

⁴ "Pound's Theory of Social Interests" in *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*, pp. 560 and 571.

⁵ "Roscoe Pound as a Former Colleague Knew Him," *Ibid.*, p. 419.

⁶ Book Review: *Interpretations of Modern Legal Philosophies*, *Harvard Law Review*, Vol. LX, (1947), p. 988.

⁷ *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*, contains essays by thirty-eight legal scholars from North and South America, South Africa, Australia and Europe.

The Introduction contains many congratulatory messages from many foreign jurists, legal associations and politicians. Edmond N. Cahn writing in the 1947 *Annual Survey of American Law* finds the fact that only two of the thirty-eight essays deal directly with Pound "a tribute to the fact that he created a widespread and informed interest in legal philosophy where he had found a generation composed almost entirely of ignoramuses and misologists." p. 1104.

⁸ For a bibliography of works about Pound published before July 1, 1940 cf. *A Bibliography of the Writings of Roscoe Pound* by Franklyn C. Setaro. Cambridge, Harvard University Press, 1942, pp. 139-152.

was negligible.⁹

Beginning with the second half of the last century the historical school of legal interpretation was in the ascendancy. Many factors combined to explain this phenomenon, not the least of which was the fact that in 1849 Luther S. Cushing, a student of Savigny, was teaching law at Harvard University. This fact in addition to the appearance a few years earlier of the writings of Kent (1826-30) and Story (1832-45) led to widespread acceptance of historical jurisprudence.¹⁰ The movement received new impetus when, after 1870, American legal students in increasing numbers were pursuing their studies in Germany. Stated briefly this school maintains, after Savigny, that law cannot be made but must be found, the growth of law being an unconscious, organic process with legislation subordinated to custom. As law grows and becomes more complex and the popular consciousness (*Volksgeist*) cannot manifest itself directly it becomes represented by lawyers who formulate the technical legal principles; the lawyers do not form laws but formulate the popular consciousness; legislation follows as the last stage. Laws are not universally valid or applicable, but each people has its own legal habits just as it has a peculiar language which is not applicable to others. In this system the jurist ranks before the legislator in legal progress; but the jurist does not make laws, rather he develops the technique of following the evolution of the *Volksgeist* by legal historical research.¹¹ The historical school has always been skeptical of legislation and opposed to codification.

Competing with the historical school for the primacy was another group which Pound calls the school of 'philosophical juris-

⁹ Pound, Roscoe, *The Formative Era of American Law*, New York, Peter Smith, 1950, Copyright 1938 by Little, Brown and Co., Reprinted with permission, pp. 101-102; 109-110.

¹⁰ *Ibid.*, p. 21: "With the rise of historical thinking in the nineteenth century there comes to be a combination of history and philosophy, observable in Kent and marked in Story. The stabilizing work of natural law is taken over by history. . ."

¹¹ Friedmann, W., *Legal Theory*, London, Stevens & Sons, Ltd., 1949, Second edition, p. 129. Friedmann cites the Hayward English translation of Savigny as follows. "... the sum therefore of this theory is that all law is originally formed in the manner in which in ordinary, but not quite correct language, customary law is said to have been formed, i.e., that it is first developed by custom and popular faith, next by jurisprudence, everywhere therefore by internal silently operating powers, not by the arbitrary will of a law giver." Cf. Pound, Roscoe, *The Formative Era of American Law*, p. 115; "Jurisprudence," in *Encyclopaedia of Social Sciences*, Vol. VII, (1932), pp. 477-492, *passim*.

prudence.¹² This is a heterogeneous group comprising many philosophies and various versions of natural law jurisprudence. For the most part they had degenerated into a legal formalism, holding that a perfect legal system could be deduced from an ideal of the nature of law by a process of formal logic, valid for all peoples, at all times and in every place. This theory represents the remains of the so-called 'classical natural law' of the eighteenth century which had already been rejected on the Continent and was rapidly losing favor in America. Like proponents of historical jurisprudence, though for different reasons, they maintained that law could not be made but could only be found, the method of finding it being different. Also like the historical school, they doubted the possibility of creative legislation.

A third school which gained acceptance among many jurists was analytical jurisprudence, of which Bentham was the founder. Like Austin's mechanical jurisprudence, the analytical school considered positive law to be self-sufficient, divorced from any concept of natural law, ethics, or the other social sciences. Traditionally the analytical school has had unlimited confidence in man's ability to legislate, and its advocates have always favored codification. However, in the last third of nineteenth century America, Bentham's followers began to doubt that we could add to or produce human happiness by legislation. Consequently, they developed what Pound calls a 'juristic pessimism' substantially the same as the historical and philosophical schools. It is a curious phenomenon that the different schools, by different paths, arrived at the common conclusion that constructive legislation was impossible.¹³

Just before the turn of the century, when Pound came to the bar, pragmatism was coming into its own as the dominant American

¹² Pound, Roscoe, "Jurisprudence," p. 482 A; cf. *The Formative Era of American Law, passim*; *The Spirit of the Common Law*, Francetown, N.H., Marshall Jones Company, 1921, Reprinted 1947, p. 151 *et alibi*.

¹³ *The Spirit of the Common Law*, p. 151: "Five types of philosophy of law in the nineteenth century are of significance for our present purpose. We may call those who adhered to them the metaphysical school, the historical school, the utilitarians, the positivists and the mechanical sociologists. It is a striking example of the way in which the same conclusion may sustain the most divergent philosophical premises that all of these arrived ultimately at the same juristic position by wholly diverse routes and from the most diverse starting points, so that the futility of conscious effort to improve the condition of humanity through the law and the conception of justice as the securing of the maxims of self-assertion become axioms of juristic thought."

philosophy. Initiated by Charles Peirce, developed and popularized by William James, and brought to completion by John Dewey, pragmatism has dominated the philosophical field for more than half a century. Dean Pound has frequently pointed out that legal theory is very resistant to change and usually lags a generation behind changes in philosophical ideals. This was also true of pragmatism, which had not seriously affected juristic thinking at the turn of the century. However, with the eloquent influence of Oliver W. Holmes, pragmatism soon became the dominant legal philosophy. More recently pragmatism has divided into many, and often contradictory, branches. The most vocal contemporary group is the school of legal realism, a name which Pound characterizes as a boast rather than a description.¹⁴ This group did not merit serious consideration when Pound first began his career, but they are introduced here because much of his subsequent writing is concerned with them. The realists deny the efficacy not only of natural law and positive law, but further they repudiate the principle of judicial precedent, which is the very cornerstone of the common law system.¹⁵ For them there is no law except the judge's decision in the individual case, and that decision is law for that case alone not being drawn from previous cases and not affecting future cases.

In the light of this review, however brief, of his intellectual environment we can now pose the problems which Pound saw and to the correction of which he set his mind and his pen. Some of these problems are not original with Pound or peculiar to America, but as ancient as law itself. Others, however, are a peculiar product of the time and place.

The first problem, which he calls the 'perennial problem' of law because it goes back to the very beginnings of law, has two aspects, but because of their close association they can be, and are, treated as one. These two aspects, are, first, the general security versus the individual life, and secondly, the need for stability versus the need for change. Different legal theories at different times have maintained one of these at the expense of the other. Pound feels

¹⁴ Pound, Roscoe, *Justice According to Law*, New Haven, Yale University Press, 1951, p. 63; cf. "The Call for a Realistic Jurisprudence," *Harvard Law Review*, Vol. XLIV, (1931), pp. 697-711, *et alibi*.

¹⁵ Garlan, Edwin N., *Legal Realism and Justice*, New York, Columbia University Press, 1941, pp. 20-21, 24, 42: "A right is an affair of the future, and for the individual who claims the right it is an affair of probability." p. 93 *et alibi*. Cf. Frank, Jerome, *Law and the Modern Mind*, *passim*.

that these preferences cannot be maintained. In America during the last century the general security was preferred. In the present century there is a tendency to prefer the individual life.¹⁶ The problem is to have a legal system which gives recognition to one without destroying the other. The formalists and analytical school protected the general security by providing in advance for every eventuality, but they gave no consideration to the individual offender; the law had to be applied mechanically. Contrariwise the historical school, and even more so the realists, consider only the individual case thereby endangering the general security.

Considering the problem from the viewpoint of stability versus change the alignment is almost the same. For the formalists and analytical jurists the perfect code is valid for all times. For the historians and realists there is only change.¹⁷ Stability is required so that men may plan a course of action with a reasonable expectancy of what course the law will take. It is particularly true in economic fields that men wish to act with confidence that their operations of today will not be judged illegal tomorrow. At the same time the law may not be so rigorous as not to accommodate itself to changes in society which are constantly taking place.

There were other problems, more peculiar to the time and place, in Pound's mind not only in his famous St. Paul address but in much of his subsequent speaking and writing. The first of these, already intimated, was what he calls 'juristic pessimism.'¹⁸ The various schools of jurisprudence, from diverse premises, arrived at the common conclusion that legislation is impossible or useless. This give-it-up philosophy generated the attitude that you cannot do anything, therefore do not try to do anything. Against this attitude Pound has been a relentless foe.

Secondly, a major problem for American jurisprudence was created by the enormous changes in the social and economic order. The law as received into America and developed during the form-

¹⁶ Pound, Roscoe, *An Introduction to the Philosophy of Law*, New Haven, Yale University Press, 1922, 8th Printing, 1950, p. 96: "The last century preferred the general security. The present century has shown many signs of preferring the individual moral and social life. I doubt whether such preferences can maintain themselves." Cf. *Criminal Justice in America*, New York, Henry Holt & Co., 1930, Copyright by Brown University, p. 38, *et alibi*.

¹⁷ Cf. Frank, *Op. Cit.*, *passim*.

¹⁸ Cf. note 13 above.

ative era was ideally adapted to a pioneer, agricultural society. But by the turn of the century the era of expansion and frontier was rapidly being passed and the country was becoming an urban, industrial society. Changes in law had not kept pace with the changes in the structure of society.¹⁹

A third problem which he attacked was the inadequate education of the legal profession. One could with reason cite Pound's own biography as indicative of the meager requirements for admission to the bar. That he became the most eminent among the legal scholars is a tribute to his own initiative and genius and not to the demands of the legal profession. That these demands were not exacting can be seen from the fact that he was admitted to the bar before reaching the age of twenty after having already begun a career as a botanist. In the beginning of American legal history this was not accidental but part of a policy. An excessive fervor for democracy and universal equality fostered the idea that no professional class should be set apart; every profession should be accessible to all.²⁰ He cites examples of blacksmiths, farmers and common laborers who were justices of state supreme courts.²¹ The practice of apprentice-training for lawyers persisted well into the present century and almost anybody could serve a term as a clerk in an attorney's office and then go into business himself.²² The situation reached such proportions as to prompt Mr. Justice Miller to remark that the prime factor in the formation of our law was ignorance.²³

A fourth problem is seen in the inadequate and poor legislation provided by the lawmaking bodies of our government. Reasons for this legislative inadequacy are various, but certainly one reason was the traditional common law attitude towards legislation. The common law jurist is wont to give very little recognition to legislative law, or at best to interpret it very strictly as applying to the particular case in point and not as providing a point of departure for legal reasoning. This attitude in turn led to legislative irresponsibility prompting legislators to give only skeleton rules or directives,

¹⁹ *The Formative Era of American Law*, p. 98; *Criminal Justice in America* p. 19; *The Spirit of the Common Law*, Ch. V.

²⁰ *The Formative Era of American Law*, p. 8 *et alibi*.

²¹ *Ibid*.

²² *Criminal Justice in America*, p. 145, *et alibi*.

²³ *The Formative Era of American Law*, p. 11.

the details of which were to be worked out by judicial decision; or they turned out laws which were practically unenforceable. Another reason can be found in a tendency of the legislative branch to meddle in judicial functions during the very early period of legal history. The net result was a growing popular distrust of legislatures and a turning to the judiciary not only for judgment but also for making law. Judicial empiricism became the common manner of lawmaking.²⁴

Related to this problem is a fifth problem of more recent origin. This is what Pound calls administrative or executive justice as contrasted with judicial justice. In recent years, and particularly in the last two decades, he sees a growing, and undesirable, tendency for the executive branch of the government to assume to itself many functions belonging properly to the judiciary.²⁵ This is seen as undesirable because the executive branch is not *ex officio* qualified by training and experience for the judicial functions. More important, he sees in administrative justice a tendency towards absolutism.²⁶

Finally a sixth problem requiring attention is the tendency, developed in the last half of the last century, to mix law and politics. Another name for the same problem is the elective judiciary.²⁷ He can see no correlation between a man's qualifications to act as a judge and his ability to influence voters to elect him to the position of a judge.²⁸ The general acceptance of the elected bench in state and local jurisdictions has had an undesirable effect on the administration of justice.²⁹ The desire to please the voter or political patron whose support can insure the judge's position is too frequently an impediment to justice.

Other problems could be mentioned, and their omission is not to be considered as granting them a slight importance. The purpose here is to mention the main problems which Pound attempted to solve as a background against which to view his theories on law. Further it is felt that almost any other problem that might be

²⁴ *Ibid.*, pp. 39, 49, 59, *et alibi*.

²⁵ *Justice According to Law*, pp. 76-78, 83; cf. *New Paths of the Law*, Lincoln, University of Nebraska Press, 1950, Ch. III.

²⁶ *Ibid.*

²⁷ *Criminal Justice in America*, p. 185; cf. *The Formative Era of American Law*.

²⁸ *Ibid.*, p. 185; cf. *The Formative Era of American Law*.

²⁹ *Ibid.*

mentioned could be subsumed under one of those already indicated. It should not be expected that our author will single out each of these problems for individual treatment. Rather does he attempt a solution that will strike at the roots of all of them simultaneously.

In studying his predecessors Pound saw that all the nineteenth century schools were subject to the common criticism of attempting to construct a science of law solely in terms of law and on the basis of law, divorced from all other phenomena of social control and civilization.³⁰ For him a legal science to meet the needs of a changing society must give up its exclusiveness and work in closer association with the other social sciences.³¹ It must study law in all of its senses in relation to the whole problem of social control.³² The social purposes of law must be stressed more than the sanctions, as law is to be regarded as a social institution which can be improved by intelligent effort.³³ To discover the best means of directing and furthering efforts to improve the law the jurist must be concerned with a wide range of studies, and not just of law. This course requires a study of the actual effects of legal institutions and doctrines; a sociological study in connection with legal study in preparation for legislation, as study of comparative legislation is inadequate; study of the means of making legal rules effective; a sociological legal history, that is a study not only of how doctrines have evolved and developed, considered solely as jural materials, but of what social effects the doctrines of law have produced in the past and how they produce them.³⁴ The study of legal history is very important to see what effects the jurists desired to produce, the effects actually produced and the method used to produce the desired effect. The functional attitude, that is the study not only of what legal materials are and how they came to be, but also of what they aim to effect and how they work, is fundamental in Pound's legal theory. Also there must needs be intensive study of philosophy and psychology; for a legal science to be valuable it must be consistent with the best

³⁰ Pound, Roscoe, "Fifty Years of Jurisprudence," *Harvard Law Review*, Vols. L and LI, (1937 and 1938), Part II, p. 444.

³¹ *Ibid.*, Part III, p. 812.

³² *Ibid.*

³³ Pound, Roscoe, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, Vols. XXIV and XXV, (1911 and 1912), Part III, p. 516.

³⁴ *Ibid.*, p. 513-514; cf. *Outlines of Lectures on Jurisprudence*, Cambridge, Mass., University Press, fifth edition 1943, pp. 32-34.

of modern philosophy and psychology.³⁵

Pound pursued this course of studies very seriously himself. He studied all the contemporary jurists, both of the English common law jurisdictions and the continental civil law systems, taking freely from the most diverse schools of thought the materials which he found useful; he considered that there can be many approaches to juristic truth and that each can be significant to a particular problem.³⁶ Nor was legal history neglected; he studied widely the legal systems of the past.³⁷ In like manner he gave himself to the study of modern philosophy, psychology and sociology. In sum, there is scarcely one among modern and contemporary sociologists, philosophers and jurists to whom he does not owe, and acknowledge, a debt.³⁸

It was in the light of these extensive studies that Pound developed his system of sociological jurisprudence, which will be outlined in the following chapters. It presents a curious union of many diverse, and often contradictory, philosophies of law. But to this peculiar union he gives a fundamental unity based on the purpose of law. But now to turn to an analysis of the system itself.

³⁵ "The Call for a Realistic Jurisprudence," pp. 710-711; cf. *Outlines of Lectures on Jurisprudence*, p. 35.

³⁶ *Ibid.*, p. 711.

³⁷ Pound, Roscoe, *Interpretations of Legal History*, Cambridge England, University Press, 1923, *passim*; *et alibi*.

³⁸ "The Scope and Purpose of Sociological Jurisprudence,"; "Fifty Years of Jurisprudence,"; cf. Cowan, Thomas, in *Interpretations of Modern Legal Philosophies*, pp. 130-142.

CHAPTER II

THE NATURE OF LAW

Before entering upon a detailed discussion of the nature of law according to Pound it is necessary first of all to have a clear notion of the subject about which we are speaking. It is to Pound's credit that, among English-speaking jurists, he has done much in clarifying the meaning, or diverse meanings, of the word. Frequently among the treatises on law we find the term applied indiscriminately to any one of a number of possibilities without distinction.

For Pound 'law' has three meanings: *first*, it signifies the legal order, that is the ordering of human conduct through the systematic application of the force of politically organized society. In this sense it is called a regime of social control. *Secondly*, we may mean the sum of the authoritative grounds of judicial and administrative decision in such a society. *Thirdly*, we may mean what is called the 'judicial process.' A fourth meaning can be added since the term 'law' can be, and often is, used to mean all three of the other meanings just mentioned.¹

When we speak of a 'science of law' we are using the term in the second sense. It is in this sense that Dean Pound uses the term in

¹ Pound, Roscoe, "A Comparison of Ideals of Law," *Harvard Law Review*, Vol. XLVII, (1933), pp. 1-2 cf. *Justice According to Law*, p. 48; "My Philosophy of Law," essay in *My Philosophy of Law, Credo of Sixteen American Scholars*, Boston, Boston Law Book Co., 1941, *et alibi*.

analyzing the science of law,² and it is likewise in this sense that it will be used here unless otherwise indicated.

Used in this second sense as the body of authoritative grounds to decision, law is not a simple concept. There are contained therein three elements: precepts, technique, and ideals.³ Furthermore, the element of precepts contains within itself four distinct concepts. First, there is the *rule* or precept in the strict sense, which determines a detailed set of consequences for a determined state of fact. Secondly, there are *principles* or authoritative starting points for legal reasoning. Thirdly, there are *legal conceptions* or authoritative categories into which cases are fitted and by reason of which certain rules and principles become applicable, as, for example, sale and trust. And, fourthly, there are *standards*⁴ or measures of conduct prescribed by law from which one departs at his own peril, as, for example, the standard of due care not to cause an unreasonable risk of injury to others.⁵

In speaking of law in the second sense there is a temptation to think only of the precepts, and then only of the rules or precepts in the strictest sense. But in truth the elements of technique, or 'art of the lawyers' craft,' and the element of ideals are quite as authoritative and no less important. It is the element of technique which distinguishes the two great modern systems of the law.⁶ The technique of the common law lawyer consists in reasoning by analogy from reported judicial decisions while considering statutes as furnishing a rule for the class within its purview and not as a starting point for legal reasoning. The civil law, on the contrary, rea-

² *Ibid.*, p. 2 *Justice According to Law*, p. 49: "The second sense is the one in which Lawyers habitually use the term 'law.' It is the meaning which the word has borne since the classical Roman jurists and the one to which we may well restrict it in the science of law."

³ *Justice According to Law*, p. 50; "Jurisprudence," p. 486: "... analytical jurists had in mind the precept element of law ... historical jurists had in mind very largely the (technique) traditional art of the lawyer's craft ... and philosophical jurists had in mind the ideal element in law. Today we may very well give up these discussions. All three elements should be considered and together they constitute the background of juristic writing and judicial decision."

⁴ *Justice According to Law*, p. 58: "There is a characteristic element of fairness or reasonableness in standards which makes them a point of contact between law and morals."

⁵ *Ibid.*, pp. 56-58, *et alibi*, e.g., *Sources and Forms of Law*, Notre Dame, The College of Law of the University of Notre Dame, Copyright reserved to the Author, 1946; *The Task of Law*, Lancaster, Pa., Franklin and Marshall College, 1944; "Jurisprudence," *passim*.

⁶ *Ibid.*, pp. 50-51; *The Task of Law*, pp. 47-48.

sons by analogy from legislative precepts while considering court decisions as establishing only one precise point for the case in litigation and not as a point of departure for legal reasoning.

Like the technique the ideal element does not determine a detailed set of consequences for a detailed state of fact, but in the deciding of causes the ideal element is of great importance and is, indeed, decisive in new cases when there is necessity of choosing from among equally authoritative principles. This ideal element is "a picture of the social order of the time and place, a legal tradition as to what the social order is and so as to what is the purpose of social control, which is the authoritative background of interpretation and application of legal precepts."⁷ The ideal element, presenting as it does a picture of what the legal order ought to be and what it ought to achieve, is undoubtedly the most important element.⁸ It is just that it should be so since in practical science the end is first in intention and is an element in the premises of the practical discourse. As we shall have occasion to see in greater detail later the ideal element has a preponderant role when there is question of weighing interests to determine which one shall be recognized and to what extent it shall be recognized.

Leaving the ideal element for more detailed consideration later, we can now combine the elements which enter into law to form a definition. Considering the elements just discussed we can define law as "a body of authoritative precepts, developed and applied by an authoritative technique in the light of authoritative traditional ideals."⁹

The above is a definition of law in the second sense of the word, and this is the way it is used in the science of law. It is, therefore, this sense of the word with which we are chiefly concerned. However, at this time it would not be without value to examine other definitions of law given by Pound from different points of view. Obviously we are using the word 'definition' in a very broad sense, since one real definition would tell us all we seeking are to show by

⁷ *Ibid.*, p. 54; *The Formative Era of American Law*, pp. 28-29; "A Comparison of Ideals of Law," pp. 2-3; "The Ideal Element in American Judicial Decision," *Harvard Law Review*, Vol. XLV, (1931), pp. 147-148; "The Theory of Judicial Decision," *Harvard Law Review*, Vol. XXXVI, (1923), p. 958, *et alibi*.

⁸ "The Theory of Judicial Decision," p. 958.

⁹ *Justice According to Law*, p. 50.

many. Actually it is extremely difficult to find a definition in the writings of Dean Pound. The nearest approach is descriptions from different points of view. Besides the one just given we find three others that consistently appear in Pound's writings.

Firstly, as a regime law is defined as a highly specialized form of social control in a politically organized society exercised through the systematic and orderly application of the force of such a society.¹⁰ It is the force of politically organized society which constitutes the formal element of law.

From still another point of view, which might aptly be called the origin, law is defined as experience developed by reason and reason tested by experience; it is experience organized and developed by reason, authoritatively promulgated by the lawmaking organs of society and backed by the force of that society.¹¹ The importance of reason is insisted upon throughout, but it is not reason operating in a vacuum. It must be reason tested and guided by experience.

Finally, viewed with regard to its end, law is defined as a task of social engineering designed to eliminate friction and waste in the satisfaction of unlimited human interests and demands out of a limited store of goods of existence.¹² This is undoubtedly the most important aspect of Pound's doctrine of law. He insists always that law cannot be judged with reference to itself, as the analytical school judges, or with respect to an ideal picture of law, as the formalists do, but must be judged functionally with respect to its end. The relationship between this view of law and the ideal element already discussed is readily seen, since it is the ideal element which proposes the end which the law should effect and it is with a view to the ideal element that demands and interests are classified and either granted or denied recognition. But that must be discussed in more detail later.

Having seen four definitions of law from different points of view we can make a synthesis and achieve a composite definition comprising all the meanings given by Pound: Law is a system of guides to judicial decisions, including precepts, technique, and ideals, found by reason tested by experience, promulgated by the authority of

¹⁰ "My Philosophy of Law," p. 249; *Justice According to Law*, p. 48, *et alibi*.

¹¹ *The Task of Law*, p. 62.

¹² Pound, Roscoe, *Social Control Through Law*, New Haven, Yale University Press, 1942, p. 64; "Jurisprudence," p. 487 B.

politically organized society and backed by the force of that society, for the purpose of securing the maximum of human interests and satisfying the maximum of human demands with a minimum of friction and waste.

This composite definition reveals essentially the nature of law according to Pound, but it must be elaborated in a little more detail. He constantly refers to law as a process of social engineering. This name, however, is somewhat misleading. The analogy with engineering is not immediately evident. Engineering is a practical art which seeks to bring into concrete existence a plan which has been conceived and drawn up in detail in advance. It is difficult to see that Pound looks upon law as striving to achieve an orderly plan which has been well formulated in advance. He expressly denies that law is a reflection of divine reason governing the universe or of a God-given order.¹³ Rather it is a process of social adjusting. It is a system of practical compromises of conflicting and overlapping interests.¹⁴

In a world in which there are an unlimited number of human demands and desires but where the means of satisfying those demands are limited it is inevitable that conflicts should arise. These conflicts are resolved by giving legal effect to one interest which thus becomes a legal right, or simply a 'right.' In law we must reconcile and adjust these conflicting interests or claims so as to secure as much of the totality of them as we can.¹⁵

It is incorrect, he tells us, to speak of rights before interests have been defined, delimited and recognized by law. Once this has been done the 'rights' is the means by which the interest is secured. Theories of natural rights erred in confusing the interest which the law should secure with the rights by which it is secured. For Pound a natural right is nothing other than an interest which we think should be secured, a demand which we think should be satisfied.¹⁶ An interest exists independently of any law and is not a creature of the state, but it is an error to think that it has any binding force until defined, delimited and recognized by the law.

¹³ "The Theory of Judicial Decision," Part III, p. 594.

¹⁴ *The Formative Era of American Law*, pp. 125-126.

¹⁵ *Justice According to Law*, p. 31. Cf. "Philosophical Theory and International Law," *Bibliotheca Visseriana*, Vol. I, (1923), p. 89 and "My Philosophy of Law," p. 259.

¹⁶ *The Spirit of the Common Law*, pp. 91-92.

In the light of what principles are these interests classified, defined, delimited and recognized? Pound renounces any pretense of immutable principles or absolute judgments. For him it is a matter of compromise of conflicting interests.¹⁷ So long as a satisfactory compromise can be reached and we may satisfy a social want without a disproportionate sacrifice of other interests there are no natural, necessary, reasons why we should not do so. Not all interests can be satisfied, at least not fully; where interests of equal valor are in conflict they must be reconciled and compromised so that neither is fully satisfied nor is either completely sacrificed.¹⁸

Pound has outlined an elaborate hierarchical system of interests which are to be recognized or are pressing for recognition. It is not our intention to enter into the practical details of his legal theory to too great an extent, but since this theory of interests forms the central core of his theory it must be presented at least in summary form. The interests which the law should recognize and to which it should give effect are classified in three major groups. They are social interests, public interests, and individual interests.¹⁹ An interest for the purpose of the law, is a claim or demand which human beings make either as individuals or in groups or associations and of which the legal order must take account. Individual interests are those claims which individuals make as individuals and assert in title of that individual life. Public interests are those claims asserted in title of life in politically organized society. And, finally, social interests are those demands and claims asserted in title of social life in civilized society; they are treated as the claims of the entire social group.²⁰ Not every claim that men might make is

¹⁷ *An Introduction to the Philosophy of Law*, p. 96: "But I am skeptical as to the possibility of an absolute judgment. We are confronted at this point by a fundamental question of social and political philosophy. I do not believe that the jurist has to do more than recognize the problem and perceive that it is presented to him as one of securing all social interests so far as he may, of maintaining harmony among them that is compatible with the securing of all of them."

¹⁸ *Ibid.*, pp. 97-98: "What I do say is, that if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so." Cf. *Social Control Through Law*, p. 78.

¹⁹ Pound, Roscoe, "A Survey of Social Interests," *Harvard Law Review*, Vol. LVII, (1943), p. 1; cf. *Social Control Through Law*; *Outlines of Lectures on Jurisprudence; The Task of Law*. This division is attributed to Ihering.

²⁰ *Ibid* pp. 1-2

necessarily or always in one of these groups, but when they are compared for the purpose of adjusting conflicts they must be compared with reference to the same group. In general, he thinks, they should be compared under the most general form, that is, social interests.²¹ While the law of the last century saw only individual interests, the law today is more and more subsuming them under social interests. Wherever a demand can be satisfied if treated as a social interest rather than an individual one, it should be considered a social interest.²² For this reason he devotes most of his planning to the social interests as being the more inclusive order.

We present here a brief summary of Pound's scheme of social interests which are, or should be, recognized and given effect by law.²³ These interests are schematized in the order of importance, and that classification is arrived at by a study of past legal systems to ascertain which interests were granted as well as by a study of contemporary legal and social phenomena to determine which interests are pressing for recognition and if and how far they should be recognized.

The *first* social interest is the interest in the general security. This is a claim involved in social life to be secure against forms of actions and courses of conduct which threaten its existence. In its simplest form this interest is concerned with the general safety as being the highest law, but it extends to such forms as interest in general morals, general health, peace, order, security of transactions and of acquisitions.

Secondly, is the social interest in the security of social institutions, that is, the claim that fundamental institutions of social life be secure from courses of conduct that threaten their existence or impair their efficiency. This includes interest in the security of domestic institutions, religious institutions, political institutions, and, more recently, economic institutions.

Thirdly is the social interest in the general morals, or the claim

²¹ *Ibid.* pp. 2-3.

²² "A Comparison of Ideals of Law," p. 15; cf. "The Scope and Purpose of Sociological Jurisprudence," p. 516; *Outlines of Lectures on Jurisprudence*, pp. 32-34, *et alibi*.

²³ The essentials of this summary are taken from "A Survey of Social Interests." They may be found also in *Social Control Through Law; The Spirit of the Common Law; Outlines of Lectures on Jurisprudence, et alibi*. Cf. Patterson, Edwin W., "Pound's Theory of Social Interests," in *Interpretations of Modern Legal Philosophies*, and Friedmann, *Legal Theory*, pp. 230-231.

that social life in civilized society be secure against forms of action offensive to the moral sentiments of the general body of individuals therein for the time being. This includes policies against such misdemeanors as dishonesty, corruption, gambling and things of immoral tendency.

Fourthly there is the social interest in the conservation of social resources, or the claim that the goods of existence shall not be wasted, that courses of conduct which tend needlessly to destroy these goods be restrained. This refers chiefly to common property which is used but not owned by individuals, and is closely related to the interest in the protection and training of dependents and defectives.

Fifthly, is the social interest in general progress, or the demand that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the claim that social engineering be increasingly and continuously improved for the development of human powers. This includes interest in economic, political and cultural progress.

Sixth, and last, is the social interest in the individual life. This is in many ways the most important. It is the claim that each individual be able to live a human life in civilized society according to the standards of that society.

Such, in brief, are the social interests which are recognized or are coming to be recognized by the law. When looked at functionally, and it is in this way that it must be looked at,²⁴ the law is an attempt to satisfy, to reconcile these conflicting and overlapping interests and claims either through securing them directly or through securing certain individual interests so as to give effect to the greatest total of interests, or the interests that weigh most, with the least possible sacrifice of the scheme of interests as a whole.

The public and individual interests are less elaborately treated by Pound and the reason is not difficult to divine. From the outline of social interests just presented it is possible to see how most of the public and individual interests could be subsumed under the social interests. And where this is possible he finds it desirable that it should be so done.²⁵ Yet he does not neglect the public or individual

²⁴ "Fifty Years of Jurisprudence," Part III, p. 812. Cf. *Interpretations of Legal History*, Ch. VII; "The Scope and Purpose of Sociological Jurisprudence," p. 516; *Outlines of Lectures on Jurisprudence*, pp. 32-34; "The Call for a Realistic Jurisprudence," p. 710.

²⁵ Cf. note 22 above.

interests altogether. The public interests are, first, the interests of the state as a juristic person. These interests include the claim to integrity, freedom of action and honor of the state as a moral person as well as the claim of the state as a corporation to hold property for corporate purpose. And, secondly, there is the interest of the state as the guardian of social interests.²⁶ But, he concludes, to the extent that the public interests is one only of the dignity of the sovereign it ought to give way under modern conditions.²⁷ As already mentioned, whenever possible the interests should be subsumed under the social interests as the more inclusive order. Individual interests are given a still more summary treatment. Most of the interests which formerly were granted as belonging to individuals as individuals are now, he says, subsumed under social interests. Thus the right of the individual to possess property is taken rather as a social interest in security of possessions.²⁸ The right to expect exact performance of promises and contracts is subsumed under the social interest in security of contract and transactions.²⁹ Yet, he says, the common law is coming more and more to recognize the binding force of such promises.³⁰

It remains to be seen upon what basis these interests are so classified and either recognized or denied recognition. Pound believes that the basis for such a classification is what he calls the pre-suppositions of civilization, or, as he calls them the 'jural postulates.' These are the reasonable expectations which all men have in civilized society. They are the minimum requirements in order that that society may survive.³¹ Stated briefly these postulates are, *first*, in civilized society men must be able to assume that men will commit no intentional aggressions upon them. *Secondly* we must assume that men may control for beneficial purposes what they have discovered and appropriated for their own use, created by their

²⁶ Pound, Roscoe, "A Survey of Public Interests," *Harvard Law Review*, Vol. LVIII, (1945), p. 910.

²⁷ *Ibid.* p. 925.

²⁸ "A Survey of Social Interests," p. 20. Cf. *An Introduction to the Philosophy of Law*, p. 234.

²⁹ *Ibid.* Cf. *An Introduction to the Philosophy of Law*, p. 237.

³⁰ Pound, Roscoe, "Common Law," in *Encyclopaedia of Social Science*, Vol. IV, New York, Macmillan, 1931, p. 42.

³¹ *An Introduction to the Philosophy of Law*, pp. 169-179, 188. Cf. *Social Control Through Law*, p. 112; *The Spirit of the Common Law*, p. 82; *Interpretations of Legal History*, pp. 148-149. Pound admits borrowing these postulates from Kohler, Cf. Kohler, *Philosophy of Law*, p. 83.

own labor, or acquired according to the existing social and economic order. *Third* we must assume that those with whom we deal will act in good faith, making good their promises, carrying out their undertakings according to the expectations of the moral sentiment of the community, and restoring specifically or by equivalent what comes to them by mistake or in any way whereby they receive at another's expense what they could not expect to receive under other circumstances. *Fourth*, we must assume that men will act with due care not to cast on others an unreasonable risk of injury. And finally, we assume that those who keep things, such as animals, which are likely to get out of hand and do damage will restrain them within proper bounds.³²

In the light of these 'jural postulates' the various interests which press for recognition are examined, defined, delimited and, if recognition is granted, they are secured by the law.

³² *Ibid.* Cf. *Interpretations of Legal History*, pp. 148-149. Cf. Friedmann, p. 233; De Sloovere in *Annual Survey of American Law*, (1942), pp. 920-921.

CHAPTER III

THE END OF LAW

What the end of law should be according to Pound has already been intimated briefly in giving the definition in the preceding chapter; but since it plays such a preponderant role in his legal theory it must needs receive greater consideration than given at that point.

Analyzing the history of law Pound finds three theories of the end of law that have held the ground successively in legal history and a fourth which is beginning to assert itself. The first, and simplest, which obtained in the period of primitive law was that of keeping the peace at any price. Under the influence of Greek philosophers this was superseded by the second theory which is one of preserving the *status quo*. This theory maintained itself through the period of classical Roman law, and, except for a brief interruption of primitive law under German influence, through the Middle Ages.² According to this theory the end of law is to insure social stability by putting everybody in his place and keeping him there. Emphasis is on the social order with the individual destined to serve that order at all costs to personal liberty.

With the beginning of law in the modern sense, after the Protestant Revolution, the emphasis shifted from society to the individ-

¹ *An Introduction to the Philosophy of Law*, pp. 72-74 sq.; *The Spirit of the Common Law*, pp. 85-87.

² *Ibid.*, pp. 78-79.

ual. In the beginning of law in the modern sense the purpose of law was conceived as securing natural rights, which got their warrant from the inherent moral qualities of man; there should be no restraint for any other purpose. In the 19th Century this mode of thought turned metaphysical with juristic emphasis on individual consciousness; the social problem was one of reconciling conflicting human wills. Kant had rationalized the law in these terms as a system of principles or universal rules applied to human actions whereby the free will of each might coexist with the free will of all others making a maximum of self-expression the end of law. Hegel also emphasized liberty and rationalized law as an idea of liberty being realized in human experience. Bentham considers law as a body of rules laid down and enforced by the state the end of which was to secure a maximum of happiness conceived as free individual self assertion. Spencer also conceived of the function of law as promotion the liberty of each limited only by the liberty of all.³ In any of these ways of expressing it, the end of law is conceived as that of securing the greatest possible individual self-assertion.

Toward the end of the last century and the beginning of the present the emphasis in juristic thinking began to shift from human wills to human wants or desires. Instead of thinking of the end of law as the maximum of self-assertion jurists began to think of it as the maximum satisfaction of wants and interests. The problem for jurisprudence became one of finding the criteria of the relative value of interests.⁴ Pound adopts this German *Interessenjurisprudenz*, developed from the ideas of Ihering, and gave it its greatest elaboration in his sociological jurisprudence.

Law is spoken of by Pound as one very specialized form of social control.⁵ As such the end of law must ultimately be the same as the entire system of social control, the other agencies of which are morals, religion, family and school. And so he does tell us that the end of law is at bottom the end of social control.⁶ But, he says,

³ Ibid., pp. 83-84; *The Spirit of the Common Law*, p. 87 sq., p. 194.

⁴ Ibid., p. 89; cf. *New Paths of the Law*, pp. 4-5; *Justice According to Law*, pp. 19-20.

⁵ Cf. definition of law as a regime in preceding chapter, p. 24; cf. "My Philosophy of Law," p. 249; *Social Control Through Law*, p. 41.

⁶ "My Philosophy of Law," pp. 250 and 252: "If, as lawyers must, we look at law, in all of its senses, functionally with respect to its end, as the end is at bottom the end of social control, our science of law cannot be self-sufficient. Ethics has to do with another great agency of social control covering much

the other agencies of social control no longer exercise an organized effect.⁷ So in modern society law has become the paramount agency.⁸

Now, we can ask, what is the end of social control of which law is the paramount agency? This is defined as an ideal of cooperation toward civilization, to raising human powers to their highest possible unfolding, to a maximum of human control over external and internal nature for human purposes.⁹ He is speaking in the same vein when he refers to law as giving external support to man's social instincts as against selfish, aggressive instincts, approving the opinions of some last-century jurists who spoke of law and government as extensions of individual self-control.¹⁰ Law, unlike the laws of physical sciences which are based on observation of what *is*, must be based on experience and observation of what *ought* to be, of how men *ought* to conduct themselves in relation with others.¹¹ The law is compared to some traffic regulations, such as lines in the middle of a road, which direct human actions the way they ought to go.¹² Still using traffic regulations as an example, he tells us that law must form habits of proper behavior instead of waiting for them to develop,¹³ even though the reasonableness of the law is not apparent at once to all. In still other instances he says that the end of law is justice, which in turn is defined as "an ideal relation among

of the ground covered by the legal order and having much to tell us as to what legal precepts ought to be and ought to bring about."

⁷ *Social Control Through Law*, pp. 21-25.

⁸ *Ibid.*, p. 20: "In the modern world law has become the paramount agency of social control. Our main reliance in the society of today is upon the force of politically organized society."

⁹ *Ibid.*, pp. 127 and 132: "An ideal of civilization of raising human powers to their highest possible unfolding of the maximum of human control over external nature and over internal nature for human purposes..."; cf. "A Survey of Social Interests," p. 30: "Social interest in general progress, that is the claim, . . . , that the development of human powers and of human control over nature for the satisfaction of human wants go forward, the demand that social engineering be increasingly and continuously improved, as it were the self-assertion of the social group toward higher and more complete development of human powers."

¹⁰ *The Task of Law*, pp. 25-26.

¹¹ *Ibid.*, p. 49; *Social Control Through Law*, p. 32: "But we are not dealing with physical nature, as to which opinions of good and bad and criticisms of its phenomena are irrelevant. We are dealing with phenomena in the domain and under the control of the human will and what it does not tell the whole story. Here the ultimate question is always what ought to be . . ."; "Jurisprudence," p. 485 A.

¹² *Criminal Justice in America*, p. 29.

¹³ *The Task of Law*, p. 65; cf. *Justice According to Law*, p. 17.

men.”¹⁴

Looked at functionally with respect to its end, which is the end of social control, law is not self-sufficient. It depends upon other agencies especially ethics, to point out what legal precepts ought to be and what they ought to effect.¹⁵

The above presentation of the end of law would be readily acceptable to any scholastic philosopher and it is all found in Pound's writings. However he frequently contradicts these statements or qualifies them until they have no meaning, at least no acceptable meaning, left. Thus the highest development of human powers¹⁶ loses some of its lofty appeal in his survey of social interests when he goes on to explain that this fifth interest, which he calls the “social interest is general progress”¹⁷ covers such major policies as freedom of property, free trade and protection from monopoly, free industry, and encouragement of inventions as well as a policy of political progress through free criticism, free education and the like.¹⁸

The conflict between selfish instinct and social instincts¹⁹ which law is to help to control is seen to be a conflict between moral virtue and justice. The self-assertive instincts are identified with individual moral development and the social instincts with justice. The two are seen to be in essential conflict. So law must maintain one set of moral values against another.²⁰

By justice as the end of law he does not mean an individual virtue; nor does he mean the ideal relation among men. Rather

¹⁴ *Justice According to Law*, p. 19.

¹⁵ “My Philosophy of Law,” p. 252; *Social Control Through Law*, p. 62.

¹⁶ Cf. note No. 9 above.

¹⁷ “A Survey of Social Interests,” p. 30.

¹⁸ *Ibid.*

¹⁹ Cf. note No. 10 above.

²⁰ *The Task of Law*, pp. 25 and 36: “Undoubtedly there are inherent difficulties in a regime of justice according to law. But we must pay a price for order, security, and a developed economic order. We must pay a price for a balance of security, justice in the sense of the ideal relation among men, and morals in the sense of the highest individual development. No one of these can be carried out to a logical extreme at the expense of the others. Free individual self-assertion — spontaneous free activity — on the one hand, and ordered, even regimented cooperation, are both agencies of civilization. A social order which ignores and would repress either is not moving toward the highest unfolding of human powers.” Cf. *Justice According to Law*, p. 21 citing Radbruch whom he had just referred to as the “foremost philosopher of law . . . in the present generation” as saying there is an irreducible anti-mony between justice, morals and security.

does he mean a regime, an adjustment of relations and ordering of conduct so as to satisfy the maximum of human claims and desires with a minimum of friction and waste.²¹ This tells us not only what law *does* but also what it *ought* to do.²²

²¹ *Social Control Through Law*, pp. 64-65.

²² "My Philosophy of Law," p. 252.

CHAPTER IV

SOURCES OF LAW

In considering the question of the sources of law there are two major problems. First there is question of the proximate authoritative sources from which the existing legal precepts are drawn. Secondly there is the problem of the source of the authority of the law as such.¹ The second of these poses three distinct problems: the immediate practical source, the ultimate practical source, and the ultimate moral source of the authority of law.² In dealing with the first problem the term 'source' has been and still is used to mean at least four different things: the authoritative texts which are the basis of juristic and doctrinal development, the 'raw materials' from which judges derive the grounds for deciding cases, the formulating agencies by which rules and principles are shaped, and the literary shapes in which precepts are found. This last Pound prefers to call 'form' rather than source of law.³ All of these answer the question of how and by whom the content of the precepts has been worked out, whence they derived their content as distinct from their force and authority.⁴

¹ *Sources and Forms of Law*, p. 3.

² *Social Control Through Law*, p. 51; *Sources and Forms of Law*, p. 5.

³ *Sources and Forms of Law*, pp. 3-5.

⁴ *Ibid.*, p. 5.

1. SOURCE OF CONTENT

Considering the factors to which legal precepts owe their content, Pound finds there are six: usage, religion, moral and philosophical ideas, adjudication, scientific discussion and legislation. For our present purpose this is a less important question than that of the source of the authority of law, so a very brief discussion of each will suffice.⁵

Usage becomes a source of law when a rule or principle that has been worked out and formulated by common usage is given the authority of law by courts or legislature. The usage of merchants is an example.⁶ *Religion* in earlier stages of legal development was a principal source. In modern law, particularly on the Continent, the influence of the law of the Church is still evident;⁷ *Moral* and *philosophical ideas* have their influence not only in affecting old precepts but also in shaping, or helping to shape new ones. This is particularly true in times when equity and natural law are a predominant force and there is a tendency to identify law and morals.⁸ *Adjudication* gives rise to a tradition of judicial action as usage gives rise to a tradition of popular action. In civil law systems, where legislative precepts rather than judicial decisions form the starting point for legal reasoning, a settled course of decision may be a form rather than a source of law. In common law systems a course of judicial decisions which has only persuasive authority is a form rather than a source. But if the decisions are so well formulated that they are adapted by a higher court they become authoritative and so are a source of law.⁹ *Scientific discussion* is a source of law when the discussions of text writers and commentators are given formal authority by being embodied in the decisions and statutes of courts or legislators. Doctrinal writing has been a

⁵ *Ibid.*, pp. 5-9 (as affecting U.S. see p. 25).

⁶ *Ibid.*

⁷ *The Spirit of the Common Law*, Ch. II; cf. "Puritanism and the Common Law," in *Proceedings*, Bar Association of the State of Kansas, 27th Annual Meeting, (1910); "Law and Religion," *The Rice Institute Pamphlet*, Vol. XXVII- (1940); "The Church in Legal History" in *Jubilee Law Lectures*, School of Law, The Catholic University of America, (1939).

⁸ Pound, Roscoe, *Law and Morals*, Chapel Hill, North Carolina Press, 1924, *passim*; "Law and Morals," *Proceedings* of the 31st Annual Meeting of the West Virginia Bar Association, (1915).

⁹ *Sources and Forms of Law*, p. 25; *et alibi*.

very important agency in formulating our law. "While in form our law is chiefly the work of judges, in great part judges simply put the guinea stamp of the state's authority upon propositions which they found worked out for them in advance. Their creative work was often a work of intelligent selection."¹⁰ Finally *legislation* or direct formulation of legal precepts by the lawmaking organs of the state is an important source of law. This is a particularly important source in civil law jurisdiction, while it is less so in common law systems and in America has made no lasting contribution to law.¹¹

Briefly, the forms or literary shapes in which the common law of the United States are found authoritatively expressed are seven: 1) decisions of old English courts (before the American Revolution). 2) American judicial decisions, after the Revolution. 3) Judicial decisions of English and other common law jurisdictions since the Revolution. 4) the Law Merchant. 5) the Canon Law of the Church in some matters such as probate and divorce, 6) International Law, and 7) English statutes before the Revolution so far as they were applicable and received into the U.S. law.¹² It is outside the purpose of this thesis to discuss these forms in detail, so we will be content with simple enumeration.

From the foregoing it is seen that a developed legal system is made up of two elements; a customary or traditional element and an imperative or legislative element. The customary element must not be thought to derive from a customary mode of popular action. It is rather a product of customary modes of professional or juristic handling of controversies and developed by professional writing and teaching.¹³ The imperative element is that part of the legal system in the form of rules or standards authoritatively promulgated by the legislative bodies of the state prior to judicial decisions, and usually prior to action.¹⁴

One more point remains for brief consideration in connection

¹⁰ *Ibid.*, pp. 7-8; cf. *The Formative Era of American Law*, pp. 42-43 et alibi.

¹¹ *The Formative Era of American Law*, *passim*; *An Introduction to American Law*, Cambridge, Mass., Dunster House Bookshop, 1920. *passim*; "La Legislation Dans la Période de Formation du Droit Américain," in *Introduction a L'Etude du Droit Comparé*, Paris, Librairie de la Société Anonyme Du Recueil Sirey, 1938, Première Partie; *The Spirit of the Common Law*.

¹² *Sources and Forms of Law*, p. 32; cf. *The Formative Era of American Law*.

¹³ *Ibid.*, p. 37.

¹⁴ *Ibid.*, p. 70.

with the content of legal precepts. We have just seen the origin of the precepts. It remains to see the modes of growth or the 'agencies by which law is brought into harmony with society,' to use Maine's expression.¹⁵ The agencies of growth through the traditional element are eight: fictions, interpretation, equity, natural law, juristic science, judicial empiricism, comparative law, and sociological studies.¹⁶ In the imperative element there are five stages of development: unconscious legislation, declaratory legislation, selection and amendment, conscious constructive legislation, and habitual legislation as an ordinary agency which often culminates in codification.¹⁷

2. SOURCE OF THE AUTHORITY OF LAW

The source of the content of legal precepts could be developed at much greater length. However it is a question of technical nature of interest primarily to the jurist and legal historian.¹⁸ For our present purpose the source of the authority of law is of primary concern. This problem is not so elaborately developed by Pound as the former, but it provides a better clue as to his philosophy. As indicated above¹⁹ this question poses three distinct problems.

The first problem is that of the immediate practical source of the authority of the legal order. This is found to be in the legislative and administrative bodies of politically organized society and backed by the force of that society.²⁰

The second question, that of the ultimate practical source of authority, Pound considers to be a question for political science to solve. However, he submits, in our political theory we have come to accept the theory that the source is consent, the consent of a free people to be ruled by a government of their own choosing and by laws which they approve.²¹

Turning now to the ultimate moral source of the authority of

¹⁵ *Ibid.*, p. 40.

¹⁶ *Ibid.*, p. 40.

¹⁷ *Ibid.*, pp. 74-75.

¹⁸ *Sources and Forms of Law* deals almost exclusively therewith.

¹⁹ Cf. note No. 2 above.

²⁰ *Social Control Through Law*, p. 51; cf. *Sources and Forms of Law*, p. 5.

²¹ *Ibid.*, p. 52.

law Pound notes that in the classical juristic theory it was held that law deduced its authority directly from justice and derived its binding force from justice of which it is declaratory. Today, he says, the dominant legal philosophy tells us we cannot speak of an ultimate moral source. But he submits that the legal order has kept and holds authority because it performs, and performs well, the task of social engineering; in other words, because it works.²²

It might well be asked upon what premises this work of social engineering is effected, upon what principles we select and classify, compromise and reconcile the overlapping and conflicting demands which press for recognition. We cannot reconcile conflicting demands except in the light of some principle of justice, some idea as to the end of law. Pound tells us that in the past the process of social engineering has been governed by ideals of the end of law and the legal and social order, and so it should be today.²³ But, he continues, for our purposes today we do not have to be guided by any God-given order laid down once and for all, nor by any reflection of this divine reason governing the whole universe.²⁴ For our purposes, he continues, and the point is sufficiently significant to warrant direct quotation: "If but his precept is otherwise good social engineering, it is quite immaterial what are the premises of the legislative lawmaker or how he develops them or whether he has any premises at all."²⁵

Is it possible that law can achieve its purpose without principles, that justice can be really attained by a process of compromising and reconciling conflicting claims? If a compromise has been successfully effected in a controversy can we really say that justice has

²² *Ibid.*, p. 53: "The classical juristic theory is that law may be deduced directly from justice, from the ideal relation between men, and owes its binding force to the binding force of justice which it declares. The dominant legal philosophy of today tells us that we cannot answer this question . . . But the legal order goes on, whatever may be the basis of whatever rightful authority it has, and I submit it has kept and holds authority because it performs, and performs well, its task of reconciling and harmonizing conflicting and overlapping human demands and so maintains a social order in which we may maintain and further civilization." "The Pioneers and the Common Law," *West Virginia Law Quarterly*, Vol. XXVII, (1920).

²³ "The Theory of Judicial Decision," p. 953: "In the past it has been governed and its path defined by ideals of the end of law and of the legal and social order, and it is submitted that such ideals must be our reliance today and tomorrow."

²⁴ *Ibid.*, p. 954.

²⁵ *Ibid.*, p. 956.

been realized? For Pound the answer must necessarily be affirmative.²⁶ The judicial process is one not of seeking a reasonable principle of justice but of a trial and error method of finding the *workable* legal precept.²⁷ The workableness, the functional approach, is always stressed rather than the intrinsic reasonableness of legal precepts. Therefore he approved the jurists of the last century who rejected natural law because the intrinsic reason and justice of rules do not give them an unchallengeable authority.²⁸

Necessarily connected with the question of the source of the authority of law is that of the source of rights and obligations. By reviewing Pound's opinions as to the source of these rights and obligations we obtain a clearer insight into his theory of law.

Looking first at the question of rights, Pound reviews opinions of his predecessors and notes that in antecedent legal theories it was commonly held that rights were a necessary consequence of human nature and pertained to man simply because he is man. And they thought of law as giving effect to these rights simply because they are natural rights.²⁹ Now, however, we should speak rather of interests than of rights. These interests are the demands

²⁶ Cf. Ch. III, note No. 22.

²⁷ "The Theory of Judicial Decision," p. 953: "Our chief agency of lawmaking is judicial empiricism — the judicial search for the *workable* legal precept, for the principle which is fruitful of good results in giving satisfactory grounds of decision of actual causes, for the legal conception into which the facts of actual controversies may be fitted with results that accord with justice between the parties to concrete litigation. It is a process of trial and error with all the advantages and disadvantages of such a process." (Italics his) Cf. *The Formative Era of American Law*, p. 124.

²⁸ "Philosophical Theory and International Law," p. 83: "Yet the jurists of the last century were right in their judgment that the classical law-of-nature philosophy could serve them no longer. They did not perceive that the facts of political life which it assumed and interpreted were changing fundamentally. But they did perceive vividly that its theory of the source of legal obligation was unsuited to the times. A theory that found the binding force of legal rules in the intrinsic reason and justice of the rules themselves did not put behind its rules the unchallengeable basis of authority which men have been eager to provide for the law of the land." Cf. "Jurisprudence," p. 483 *et alibi*.

²⁹ "Jurisprudence," p. 489A: "Where the nineteenth century thought of law as existing to give effect to natural rights . . . , jurists since Ihering have thought of recognizing, delimiting and securing interests. It is conceived that a legal system attains its end by recognizing certain interests, by defining the limits within which these interests shall be recognized legally and given effect through legal precepts and by endeavoring to secure the interests so recognized within the defined limits. For such a theory an interest may be defined as a demand or desire which human beings, either individually or in groups, seek to satisfy and of which therefore the ordering of human relations must take account. . ."

or desires which human beings, living in society, seek to satisfy and of which the legal order must take account. These interests do not, however, give rise to an unchallengeable claim against society, or against other individuals, until they have been defined, delimited, and given legal recognition within the defined limits. They are similar to what jurists used to call natural rights in that they are not created by law and would exist independently of law. "So much of a kernel of truth there was in the old ideas of a state of nature and in the theory of natural rights."³⁰

We can illustrate this shift in emphasis by one concrete example, the right to property. Pound sees in the institution of property not a natural right which is given effect by legal precept, but a wise bit of social engineering. Private property is a way of satisfying more interests, more demands and desires with a minimum of friction and waste.³¹

Turning next to the root of obligations, Pound finds this also to be in social interest. Emphasis is no longer on the individual will but upon the desires and claims involved in civilized society.³² The basis for delictual fault (*culpa*) is a jural postulate of civilized

³⁰ *Ibid.*; cf. *The Task of Law*, pp. 26-30; *An Introduction to the Philosophy of Law*, pp. 41-43 *et alibi*.

³¹ *An Introduction to the Philosophy of Law*, p. 234: "Social-utilitarian theories explain and justify property as an institution which secures a maximum of interests or satisfies a maximum of wants, conceiving it to be a sound and wise bit of social engineering when viewed with reference to its results. This is the method of Professor Ely's well-known book on Property and Contract. No one has yet done so, but I suspect one might combine this mode of thought with the civilization interpretation of the Neo-Hegelians and argue that the system of individual property, on the whole, conduces to the maintaining and furthering of civilization — to the development of human powers to the most of which they are capable — instead of viewing it as a realization of the idea of civilization as it unfolds in human experience. Perhaps the theories of the immediate future will run along some such lines. For we have had no experience of conducting civilization on any other basis, and the waste and friction involved in going to any other basis must give us pause. Moreover, whatever we do, we must take account of the instinct of acquisitiveness and of individual claims grounded thereon. We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests, with a sacrifice of less thereby than by anything we are likely to devise — we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better." *Ibid.*, pp. 192-193; *The Spirit of the Common Law*, pp. 196-198; "A Survey of Social Interests."

³² *Ibid.*, p. 169; "A Survey of Social Interests."

society that men act with due care³³ and the basis for delictual liability is the social interest in the general security.³⁴ The obligation to keep promises or to honor contracts comes not from the will of the person who binds himself but from the social interest in the security of transactions.³⁵ It is wise social engineering. If we think that it is the order of nature it is only because the habitual application of the rules of an art come to be taken for granted.³⁶

³³ *Ibid.*, pp. 170, 188-190; "A Survey of Social Interests."

³⁴ *Ibid.*, p. 177; "A Survey of Social Interests."

³⁵ *Ibid.*, pp. 237, 188-190; cf. "Individual Interests of Substance — Promised Advantages," *Harvard Law Review*, Vol. LIX, (1945).

³⁶ *Ibid.*, p. 278: "Two circumstances operate to keep the requirements of consideration alive in our law of simple contract. One is the professional feeling that the common law is in an idealized form of natural law and that its actual rules are declaratory of natural law. This mode of thinking is to be found in all professions and is a result of habitual application of the rules of an art until they are taken for granted."

PART II

POUND'S SOURCES

CHAPTER V

POUND IN HIS INTELLECTUAL FONTS

In general it is safe to assume that one can judge the beliefs of an author from the authorities he consistently cites with approval. This principle has only a limited application when dealing with Pound since he cites with approval authors from the most diverse, and often contradictory, schools of thought. We have already seen that his definition of law as a science is a composite of three different legal schools.¹ One commentator has remarked, and with reason, that Pound is a synthesis of all legal philosophies.² Nevertheless it is revealing to examine the manner in which he interprets legal history and what use he makes of his contemporaries. It is not within the scope of this treatise to present a detailed history of Law. But we will present the main lines of Pound's interpretations

¹ Cf. Ch. II, note No. 3.

² Cowan, Thomas, A., "Legal Pragmatism and Beyond," in *Interpretations of Modern Legal Philosophies*, p. 138 *et seq.*

of legal history.³

1. INTERPRETATION OF LEGAL HISTORY

Our history of law will cover a relatively short period of time because, for Pound, law in the modern sense, and that is the proper sense, began only after the Protestant Revolution.⁴ In the period preceding the Revolution philosophy and law were in the service of theology, and both were used by the Church to sustain an unlimited authority.⁵

Are we to conclude from this that no contribution to law was made before the Reformation? Pound thinks we must. He readily admits that to the present time the Roman Law, especially the Codex of Justinian, remains one of the treasure houses of research for justice.⁶ It is important for its many precepts which have become part of the legal tradition and were carried over into later legal systems. Likewise not a few of the precepts of the canon law of the Church found their way into the legal tradition. But, notwithstanding these isolated contributions, they made no lasting contribution to the science of law.

This may come as somewhat of a surprise to those who have admired the Romans for their legal genius as well as those who have respected scholastic philosophy. Therefore it will not be without interest to see why they are so summarily dismissed by Dean Pound. We need not go into detail, but will see his conclusions with regard to these two systems, that is the Scholastics and the classical Roman jurists.

³ For the purpose of the historical sketch given here I am relying exclusively on Pound's writings. This does not indicate either approval or disapproval of his interpretation of history. For the purposes of the present chapter we are interested in seeing legal history through his eyes in order better to understand his legal theory. In a subsequent chapter we will have occasion to evaluate some of the views presented here.

⁴ "Jurisprudence," p. 478: "Modern law had its beginnings when Roman law became the rival of the law of the church and then set itself free from clerical control; and the modern science of law began when jurisprudence was emancipated from theology." Cf. "A Comparison of Ideals of Law," *The Spirit of the Common Law*, pp. 36, 87; *An Introduction to the Philosophy of Law*, p. 37.

⁵ *Ibid.* Cf. *The Spirit of the Common Law*, p. 87.

⁶ *Social Control Through Law*, p. 101.

Considering Scholasticism as the Aristotelian-Thomistic tradition, we find first that Aristotle, in the view of Pound, erred especially in two respects. First, regarding the end of law, Aristotle marked a decided progress over primitive law which considered the end of law to be a simple keeping of the peace.⁷ Despite this progress Aristotle is still far removed from a proper concept of the end of law, since he considered that end to be the maintenance of the *status quo*. This end is achieved by the ruler putting everybody in his place and keeping him there.⁸

The second great fault of Aristotle, as Pound reads him, is that he allows for no individualization, no judicial discretion, in the decision of cases. Mechanical jurisprudence originated with him.⁹ For him the judicial process was a Procrustean one of fitting each case into the legal bed, if necessary by a surgical operation.

In the Middle Ages after a short period during which Germanic law brought back the primitive idea of keeping the peace, Scholasticism restored the idea of maintaining the *status quo*. Their theory, says Pound, was supported by the law of Justinian, the philosophy of Aristotle, and the authority of Sacred Scripture.¹⁰ This conception of the end of law enabled the Church to maintain its authority by putting everybody in his place and keeping him there. Reason and philosophy were called to the aid of authority.¹¹

In the application of law the error of Aristotle was perpetuated by the jurists of the Middle Ages. The moral aspects of conduct and the justice of the individual case were sacrificed to a mechanical

⁷ In *The Spirit of the Common Law*, pp. 85-86 he speaks of Aristotle as being beyond the primitive stage; in *An Introduction to the Philosophy of Law*, p. 109 he refers to him as being the highest point of the primitive stage.

⁸ *The Spirit of the Common Law*, p. 86.

⁹ *An Introduction to the Philosophy of Law*, pp. 109-110: "To him the judicial office was a Procrustean one of fitting each case to the legal bed, if necessary by a surgical operation." Cf. "The Theory of Judicial Decision," p. 944: "Aristotle speaks as if treatment of disease by written formulas prescribed in advance for each malady, and administration of justice by written formulas laid down in advance for each species of wrong, were essentially like processes."

¹⁰ *The Spirit of the Common Law*, p. 98: "But as the authority of Justinian in law and of Aristotle in philosophy came to be accepted, this conception of justice gave way to the classical idea of preservation of the social *status quo*, which, indeed, had behind it not merely Aristotle and the Roman law but the unassailable authority of more than one text of Scripture."

¹¹ *Ibid.*

application of the rule.¹² What that rule should be was determined by the application of formal logic to authoritative texts.¹³ Pound concedes that this was not so great a fault at the time; on the contrary it answered to a need of the time in overcoming a period of barbarism. The use of reason to sustain authority marks a permanent contribution of Scholasticism to law.¹⁴ Notwithstanding the fact that it made a distinct contribution at the time, it was inadequate for the period of legal growth which was to follow.

However inadequate as history, this summary will have to suffice for our review of Scholastic philosophy of law. We repeat that our purpose is not to present a history of law but to summarize Pound's views with regard to the main lines of legal thought in order better to understand his views.

Turning now to the classical Roman law we find that, although it made some contribution to jurisprudence, yet it is inadequate as a science of law. And Roman law, says Pound, is inadequate for the same reasons as the Scholastic law. Their concept of the end of law was one of maintaining the *status quo*, thereby keeping everybody in his place and insuring the authority of the ruling social organization.¹⁵ Their method also consisted in a mechanical application of the rules without regard for the merits of the individual case.

Having thus summarily dismissed the pre-Reformation jurists, our author turns his attention to law in the modern sense. While the Middle Ages made no progress in juristic science they did develop philosophy and used it as an instrument to support authority. The post-Reformation jurists took this same instrument and used it against authority, bringing about a change of legal theory as a result of which the end of law was conceived to be a maximum of individual self-assertion.¹⁶ The beginning of this new era of jurisprudence is dated with the appearance of the chief work of Grotius in 1625. As the new doctrine was expounded by Grotius and his followers it insisted, on the one hand, on limitations upon human

¹² "The Theory of Judicial Decision," p. 658.

¹³ *An Introduction to the Philosophy of Law*, p. 37.

¹⁴ *Ibid.*, pp. 37, 38.

¹⁵ *The Spirit of the Common Law*, pp. 86-87; cf. "A Comparison of Ideals of Law," p. 4: "To Thomas Aquina, as to Cicero, to the classical Roman jurists, and to Justinian, the principle of justice is to give to everyone his own and what is one's own is determined by the social order."

¹⁶ *Ibid.*, p. 87. Cf. "A Comparison of Ideals of Law," p. 9.

activity imposed by reason of human nature, and, on the other hand, on certain inherent moral qualities or natural rights which are deducible from human nature.¹⁷ Law, says Pound, was conceived as drawing its binding force not from authority but from its inherent reasonableness.¹⁸ Coincident with this is the belief in the identity of law and morals, in the binding force of law deriving from its identity with a binding moral precept.¹⁹

This mode of thought, Pound tells us, prevailed for two and a half centuries.²⁰ There were, quite naturally, modifications, but the accent was always on individual liberty. The movement was given impetus by the German Protestant jurist-theologians and by the Puritans.²¹ This has an important bearing on the development of American law since much of the material received into the English Common Law was of Germanic origin, and hence it came into the American law.²² This mode of thinking, with individualism as the prime characteristic, persisted though there were perceptible changes in detail. Whereas the seventeenth century jurists deduced natural rights as well as a perfect code of law, valid for all times and all places, from what they conceived to be human nature,²³ the eighteenth century jurists thought rather of man in an ideal state as the norm. The things this ideal man would do were his natural liberties which the law should protect, and what this ideal man would not do was wrong and, therefore, by nature against the law.²⁴

Simultaneously, but independently from the philosophical developments on the Continent, the English courts had wrested from the crown the fundamental common-law rights of Englishmen. It was inevitable that these common-law rights of Englishmen should eventually be identified with the natural law rights of man, thus supplying a philosophical foundation for limitations on all authority.²⁵ This likewise had an important bearing upon the development of American law for it was in this way that the common law was re-

¹⁷ *Ibid.*, pp. 87-88.

¹⁸ "A Comparison of Ideals of Law," p. 10. Cf. "Grotius in the Science of Law," *American Journal of International Law*, Vol. XIX, (1925).

¹⁹ *Ibid.*, p. 10. Cf. *The Spirit of the Common Law*, p. 91.

²⁰ *Ibid.*, p. 10.

²¹ *The Spirit of the Common Law*, Ch. I and II. Cf. "Puritanism and the Common Law."

²² *Ibid.*, pp. 16-17.

²³ "A Comparison of Ideals of Law," p. 10.

²⁴ *Ibid.*, p. 12.

²⁵ *The Spirit of the Common Law*, pp. 89-90.

ceived into the new country and incorporated into the constitution.

After the seventeenth and eighteenth centuries, which Pound frequently refers to as the 'classical natural law' era, jurisprudence took a metaphysical turn. But the ideal of the end of law was still conceived to be a maximum of individual self-expression.²⁶ It has already been noted²⁷ that for Kant or Hegel or Bentham the end of law was considered to be the maximum of individual self-expression which is consistent with the like self-expression for all others.

This type of legal thinking served a purpose, and served it well, during a period of discovery, exploration and colonization. The ideal of free competitive activity of individual self-sufficing units was a major fact in the development of newly-discovered lands. The law was designed to allow the maximum of free activity by individuals; there was to be no restraint except for the purpose of protecting this liberty.²⁸

This theory of law, Pound submits, marked a decided progress over its predecessors. But with the passing of the frontiers and gradual consolidation of the new discoveries a new theory had to be devised for new circumstances. This new jurisprudence was found in a theory of interests. Instead of thinking in terms of maximum human liberty, of satisfying human wills, jurists began to think rather of satisfying human demands, interests or desires. The ideal of the end of law became one of satisfying the maximum of human interests with the minimum of conflict and waste.²⁹

Reviewing all of legal history, Pound sees it as a process of social engineering. After examining and rejecting various theories of legal interpretation which would explain legal history in terms of religion, politics, economics, ethnology, biology or great-lawyers, he concludes that legal history has been a process of engineering, of striving always for the more inclusive order in the advancement of human nature. This more inclusive order is found in co-operation for civilization, and it is attained through a satisfaction of a max-

²⁶ "A Comparison of Ideals of Law," p. 14.

²⁷ Cf. Ch. III, note No. 3. Cf. *The Spirit of the Common Law*, Ch. VI.

²⁸ *The Spirit of the Common Law*, Ch. V. Cf. *The Task of Law*; "The Pioneers and the Common Law," also above, Ch. I, note No. 19.

²⁹ "A Comparison of Ideals of Law," pp. 16-17. Cf. *The Spirit of the Common Law*, p. 91; *Interpretations of Legal History*, Ch. VII; "The Scope and Purpose of Sociological Jurisprudence"; "A Survey of Social Interests"; *New Paths of the Law*

imum of social interests.³⁰

Having reviewed, however briefly, Pound's interpretation of legal history, we turn now to a survey of contemporary legal scholars upon whom he shows, and acknowledges, a real dependence.

2. CONTEMPORARY LEGAL SCHOLARS

Merely to list all of the scholars cited by Pound would be to compose a complete litany of contemporary jurists, for he has seen and cites nearly all of them. However, so far as a real dependence is concerned, those upon whom he relies for principles can be reduced to five. In an article written some twenty years ago Pound tells us that among contemporary jurists the world over the most significant names are those of Ihering, Stammler, Géný, Duguit and Kelsen.³¹ In a footnote to the same article he adds that he suspects that Kohler will presently be considered one of the greatest juristic scholars of the century.³² While Stammler and Kelsen are named as significant scholars, as they well are, Pound does not acknowledge, or show, any marked dependence upon either of the two.³³ His suspicion that Kohler was to become one of the greatest scholars of the century seems to have been confirmed, for he shows, and admits an increasingly greater respect for and dependence upon him. With Ihering, Géný and Duguit, Kohler is among the four legal scholars to whom Pound owes the most. The fifth scholar upon whom he depends is not a professional jurist but the American philosopher William James.

It is with some misgivings that one presumes to say who of the contemporary scholars is to be considered most important as a source for Pound since he does not expressly say so himself. However, from the very nature of his work, it is not too difficult to see who has made the most important contribution to his thought.

³⁰ *Interpretations of Legal History*, Ch. VII; cf. *Social Control Through Law*; "My Philosophy of Law."

³¹ Pound, Roscoe, "Law and the Science of Law in Recent Theories," *Yale Law Journal*, Vol. XLIII, (1934), p. 530.

³² *Ibid.*, p. 531; cf. "The Scope and Purpose of Sociological Jurisprudence," Part II, p. 155, also note No. 22 above.

³³ "Fifty Years of Jurisprudence," Part II, pp. 448-452. Cf. "The Scope and Purpose of Sociological Jurisprudence," Part II, p. 154.

His statement of the purpose of law is taken almost verbatim from William James.³⁴ It was James who first popularized the philosophy of pragmatism, the essence of which is that functionalism is to be the final criterion of all judgments. In moral and social life he held that the one directive principle is that in a world where there are infinite demands and insufficient means to fulfill them all then we should at all times satisfy as many demands as we can with the least possible sacrifice.³⁵ There is a marked resemblance between this and the legal philosophy of John Dewey, the late exponent of pragmatism.³⁶ As has been remarked previously so many times, Pound also insists upon the functional approach to law, and his statement of the end of law is the same as that of James. For him this is the important aspect. His debt to the other legal scholars is one of searching for ideas and ideals as to the purpose of social control and the means to attain that purpose; these ideas he fits into a framework which is essentially that of William James.³⁷

Among other scholars Pound's debt to Kohler is enormous. To Kohler, whom he once called "without question the first of living jurists,"³⁸ Pound acknowledges dependence for the 'jural postulates' which play a primary role in his own legal theory.³⁹ As professor at Berlin University Kohler taught that there is no eternal law but there is an eternal task. That task is the promotion of culture. Hence the law must change to meet a changing culture, but it must still contain an inner uniform power that turns it in the direction of welfare.⁴⁰ He was a disciple of the will-theory of law and praises Duns Scotus and Schopenhauer for saying that the will is not the

³⁴ James, William, *The Will To Believe and Other Essays in Popular Philosophy*, New York, Longmans, Green & Co., Copyright 1896, New Impression 1917, p. 205: "Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simple to satisfy at all times *as many demands as we can*? That act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions." (Italics his).

³⁵ *Ibid.*

³⁶ "My Philosophy of Law" in *My Philosophy of Law: Credo of Sixteen American Scholars*, p. 84: "On the view here presented, the standard is found in consequences, in the *function*, of what goes on socially." Pound never acknowledges a dependence upon Dewey; the remarkable similarity in many respects comes, no doubt, from their mutual dependence upon James.

³⁷ Cf. Cowan, Thomas A., "A Report on the Status of Philosophy of Law in the United States," *Columbia Law Review*, Vol. L, (1950), p. 1092.

³⁸ "The Scope and Purpose of Sociological Jurisprudence, Part II, p. 155.

³⁹ *Interpretations of Legal History*, p. 148 Cf. Kohler, *Philosophy of Law*, p. 83.

⁴⁰ Kohler, *Philosophy of Law*, pp. 4-6.

servant but master of the intelligence. The law, he adds, is valid not because it is reasonable but because it is the will of God.⁴¹ To him legal order was an order of rights, that is a distribution among mankind of the goods of existence. And the important task of the legal order is the protection of these rights.⁴² Rights of personality must be the starting point of every legal system.⁴³ In all of his lawful acts the person must strive to bring about some change, some advance, in culture; therefore the legal technique should be so constructed that his rights are secured and he has the possibility of exerting an influence.⁴⁴ For this reason the law must be elastic enough to meet the requirements of justice in the individual case when the strict application of the legal precept would lead to results at variance with the idea of justice.⁴⁵

Pound's debt to Kohler is readily seen. As already mentioned he takes from him the notion of jural postulates.⁴⁶ We also see his influence in considering the task of the law as the advancement of culture, though Pound speaks more often of the advancement of civilization. Pound also acknowledges his indebtedness to Kohler for his insistence that law can be improved by conscious effort.⁴⁷ Yet he is not satisfied with Kohler's theory as a whole but rejects it as being too idealistic, whereas he himself prefers an instrumentalist point of view.⁴⁸

To Rudolf von Ihering Pound owes as much, if not more, of a debt than to Kohler. For Ihering the end of law is peace, and this peace is never attained without a constant struggle. Individuals and societies are obliged to undertake this struggle under pain of losing their personalities. For him a right is never purely personal, and therefore nobody is free not to defend a right. Without a struggle there can be no peace.⁴⁹ And this struggle is a duty incumbent

⁴¹ *Ibid.*, p. 9.

⁴² *Ibid.*, p. 60.

⁴³ *Ibid.*, p. 80.

⁴⁴ *Ibid.*, pp. 82 and 66.

⁴⁵ *Ibid.*, p. 86.

⁴⁶ Friedmann, p. 139 considers Kohler's jural postulates to be the proximate inspiration for Pound's theory of social engineering and social interests.

⁴⁷ "The Scope and Purpose of Sociological Jurisprudence," Part II, p. 156.

⁴⁸ *Interpretations of Legal History*, p. 150.

⁴⁹ Ihering, Rudolf von, *Der Kampf ums Recht*, Wien Universitätsbuchhandlung, Zehnte Auflage, 1891: "Das Ziel des Rechts ist der Friede, das Mittel dazu der Kampf." p. 1: "Der Frieden ohne Kampf, der Genuss ohne Arbeit gehören der Zeit des Paradieses an, die Geschichte kennt beide nur als Ergebnisse unablässiger, mühseliger Anstrengung." p. 3.

upon every individual. Further this struggle is not a disaster but a blessing.⁵⁰ The individual may not abandon his own right, for to do so is to abandon right as such.⁵¹ But because men tend towards egoism and act only in their own interest the task of the law is one of bringing them to act for the common good. This is done by creating in them artificial interests.⁵² The principal media through which this is accomplished are pleasure and pain. On this basis he develops a theory of balancing the interests of individual, State and society⁵³ which are secured by the power of the State.⁵⁴ For him the law need not always be the same but is consciously changed and improved to achieve its purpose.⁵⁵ From Ihering Pound adopts the ideas that the law is consciously changed and that it is changed in order to reach the desired results. But most important he adopts Ihering's classification of interests which he develops as the central theme of his own theory of law.

Francois GénY, professor at the Catholic University of Nancy, was one of the first and most important leaders in sociological jurisprudence and from him Pound has borrowed freely. In his most important work⁵⁶ GénY discusses two important aspects of law; these are science and technique. The science furnishes the solid foundation in objective elements of legal theory.⁵⁷ This is a work of the intelligence. Technique, on the other hand, is more a work of the will. This juridical technique is an art which adapts a whole series of means to attain the end of law. And these means are necessary in order that the law attain its final and concrete end, and they are more perfect in so far as they permit the realization of the end more rapidly, completely and economically.⁵⁸ It is this element

⁵⁰ *Ibid.*, p. 13.

⁵¹ *Ibid.*, p. 27.

⁵² Ihering, Rudolf von, *Law as a Means to an End, The Modern Legal Philosophy Series*, Vol. V, Boston, Boston Book Co., 1913; A translation of *Zweck Im Recht* by Isaac Husik. This is the theme of the entire book. Cf. especially the first chapter.

⁵³ *Ibid.*, p. 391.

⁵⁴ *Ibid.*, p. 380.

⁵⁵ *Ibid.*, p. 328.

⁵⁶ GénY, François, *Science et Technique en Droit Privé Positif*, Paris, Librairie de la Société du Recueil Sirey, Vol. I, 1914, Vol. II, 1915, Vol. III, 1921 and Vol. IV, 1924.

⁵⁷ *Ibid.* Cf. GénY, François, "Judicial Freedom of Decision: Its Necessity and Method," essay in *The Modern Legal Philosophy Series*, Vol. IX, Boston, Boston Book Co., 1914 (Translated from the French by Ernest Brunchen), p. 5.

⁵⁸ *Ibid.* Vol. IV, p. 148.

of technique in Géný which Pound finds so appealing and upon which he insists throughout.⁵⁹

The last of the legal scholars whom we mentioned as making a notable contribution to Pound's thought is Léon Duguit. The central theme of Duguit's legal theory is that authority is never legitimate in its origin. Therefore he seeks a principle of law which is above all authority.⁶⁰ Obedience is owed to authority when, only when, and to the extent that it is conformed to this principle of law.⁶¹ In another work, probably his most important, he insists upon the organization of society along group or corporate lines.⁶² Pound availed himself of the first part of Duguit's theory to some extent in seeking reasons for limitations upon authority, but it was particularly the latter part which he used most. Since American law was originally adapted to a pioneer, agricultural, and therefore, very individualistic society, Pound found it necessary to seek new principles for adapting the law to the changed circumstances that developed into an urban, industrial country. He found much of what he sought in the writings of Duguit.

Numerous other authors are cited by Pound in support of his theories, but since they do not make a substantial contribution to his philosophy of law there is no advantage in discussing them here. To do so would be an endless and unrewarding task.

⁵⁹ In addition to the times this has already occurred in the definition of law, cf. e.g. "Comparative Law and History as Bases for Chinese Law," *Harvard Law Review*, Vol. LXI, (1948); Book Review: *The Art of Law and Other Essays Judicial and Literary*, by John C. H. Wu, *Harvard Law Review*, Vol. L, (1937); "Fifty Years of Jurisprudence," Part II, p. 466.

⁶⁰ Duguit, Leon, "The Law and the State," *Harvard Law Review*, Vol. XXI, (1917), p. 3. Cf. Ehrlich, Eugen, "The Sociology of Law," *Harvard Law Review*, Vol. XXXVI, (1922), pp. 130-145.

⁶¹ *Ibid.*, p. 163.

⁶² "The Law and the State."

PART III

EVALUATION AND CRITIQUE

CHAPTER VI

EVALUATION AND CRITIQUE

In the light of the exposé just presented of Pound's legal doctrine we may evaluate, both positively and negatively, his contribution to the advancement of jurisprudence. Recalling the problems presented in the first chapter we may well inquire to what extent he has been successful in solving or alleviating those difficulties. Naturally every solution of such a problem cannot be attributed to him directly and individually, but in the development of American law during the last half century he has a preëminent role. Even yet he is not satisfied that the law is perfect, but it must be admitted that there have been many improvements since he spoke in St. Paul in 1906.¹

¹ We cannot agree with the observation of Edmond Cahn in *Annual Survey of American Law* (1944) p. 1160, that Pound appears "so well satisfied with the law as it now is." From the time of his first major address, "The Causes of Popular Dissatisfaction With the Administration of Justice," until his most recent book, *Justice According to Law*, he has been seeking and suggesting methods for improving the law.

Pound's main endeavor has been in the field of legal education. In this domain alone he has contributed enormously towards raising the standards required for the legal profession. Not only has he assisted in improving the basic requirements for admission to the legal profession, but also by his voluminous reading and writing he has helped to create a widespread interest in legal philosophy.² If there is a growing interest in natural law now in America, as there seems to be,³ there can be no doubt but that Pound helped to foster it. Though not a strong advocate of natural law himself, he has been largely responsible for introducing European ideas of legal philosophy into America. Both in and out of the classroom he has helped to bring about a closer alliance between law and the other social sciences, where he had found a generation of lawyers who studied law solely in terms of law divorced from all other social phenomena.⁴

Pound's efforts in the field of education have been productive of some good results elsewhere. It has helped to overcome much of the 'juristic pessimism' of which he spoke.⁵ It has enabled other lawyers, as well as himself, to adapt the laws of the country to changed social and economic circumstances.

Dean Pound has certainly achieved a great personal success in winning adherents to his legal theory. He has earned for himself a host of friends, admirers and followers nationally and internationally. Yet it cannot be said that his every effort was positive contribution. Many of his observations and conclusions merit critical examination. Our critique will take two forms: Historical and philosophical.

1. HISTORICAL CRITIQUE

Our historical critique is not going to be prolonged to include every historical observation, nor is it to be specifically detailed. However there are a few points which need to be corrected. If it is not too pedantic to bring up such a point, it should be said as a

² Cf. Ch. I, Note 7.

³ Cf. Utz, Coing, "Neue Strömungen in der Nordamerikanischen Rechtsphilosophie," in *Archiv Für Rechts- und Sozialphilosophie*, 38, (1949-1950) et al.

⁴ Cf. Ch. I, Note 30.

⁵ Cf. Ch. I, Note 18.

general criticism that he is guilty of a methodological error on a grand scale. Time after time he cites various authors with never a reference to the locus. The reader is left without an easy opportunity to read the text in its context. It is extremely difficult, to the point of impossibility to check all the references. In *THE SPIRIT OF THE COMMON LAW*, which he considers his most important work, he cites more than sixty individual authors, either directly or indirectly, besides groups of schools of legal thought, without one reference note.

For the reasons just given we do not know his source of information when he writes about Aristotle, but he certainly could not have been reading Aristotle's text. As was observed in the preceding chapter, Pound calls Aristotle the first of the mechanical jurists for he held that the rule of law was to be applied strictly without regard for the justice of the individual case.⁶ Pound professed a great admiration for Kohler, yet had he read Kohler correctly he would have discovered that Kohler admired Aristotle for just the opposite.⁷

However it is not necessary to go to Kohler for approval of Aristotle. The text of Aristotle makes it clear that he looked on the judge as a sort of animate justice,⁸ Aristotle calls upon equity as a correction of the law.⁹

Since Pound makes the same comments with regard to St. Thomas Aquinas as he did of Aristotle we can turn for contradictory evidence to Thomas' commentaries on the same text of Aristotle. According to Pound, St. Thomas conceived the end of law to be one of putting everybody in his place and keeping him there.¹⁰ As to the application of law in particular case, the Scholastics, says Pound, ignored the moral aspects of the case, asking only if the prescribed legal forms were followed.¹¹ In his commentary on Aristotle, St. Thomas also tells us plainly that the judge is considered to be a sort of incarnate justice in that his mind is totally possessed with justice.¹² Likewise he praises equity as being more excellent

⁶ Cf. Ch. V, Note 8 and 9.

⁷ Kohler, *Op. Cit.* p. 6-7 and 86.

⁸ Aristotle, *Nicomachean Ethics*, in *The Basic Works of Aristotle*, New York, Random House, 1941, Book V, Ch. IV, pp. 1132-1120.

⁹ *Ibid.*, Book V, Ch. X, 1137b10.

¹⁰ Cf. Ch. V, Notes 10 and 15.

¹¹ "The Theory of Judicial Decision," *Harvard Law Review*, Vol. XXXVI, (1923), Part I, p. 658.

¹² Aquinas, *In Decem Libros Ethicorum Aristotelis ad Nicomachum Expositio*, Editio Marietti, 1934, Book V, Lect. VI, No. 955.

in that it observes the intention of the legislator when his words are at variance with justice in an individual case. For the legislator, he says, looks to the plurality of cases, not however, being ignorant that his may not fit every particular case. So the judge in resorting to equity to attain justice in an individual case is doing what the legislator would do if he were there.¹³

Pound's contention that the Scholastics conceived of law as a matter of mere authority can hardly be reconciled with the definition of St. Thomas. For Pound reason came into the law after the Reformation.¹⁴ St. Thomas defines law as essentially an act of reason.¹⁵ As to its end, law is ordered to the common good¹⁶ and not to putting everybody in his place by force and keeping him there. The common good includes the ultimate happiness of all the members.

Dean Pound appears to have been too easily convinced by a popular Renaissance notion that the middle ages were dark ages. Had he investigated the Scholastic writers more carefully rather than taking the word of a secondary source he could not possibly have come to the conclusions he did. In helping to perpetuate a story that is no longer believed by prudent historians, he has rendered a disservice to scholarship in general as well as to jurisprudence. It is unbelievable that a man of Pound's intellectual ability could commit so gross an error if the doctrine of St. Thomas on law had ever once been presented to him objectively.

Turning to contemporary scholars we find that Dean Pound takes suitable phrases or ideas out of context and uses them to his own advantage. It has already been noted that from Kohler he takes the jural postulates by a scissors-and-paste method while rejecting the principles upon which they were conceived by Kohler.¹⁷

In a like manner Pound claims to take his scheme of social interests from Ihering. For Ihering an interest presupposes a right and the interest is artificially, if necessary, stimulated in order to maintain rights. For Pound, on the contrary, there are only interests which the law may or may not recognize. Private property

¹³ *Ibid.*, Lect. XVI.

¹⁴ "A Comparison of Ideals of Law," *Harvard Law Review*, Vol. XLVII, (1933), p. 10.

¹⁵ *Summa Theologica*, I-IIae, XC, a.1.

¹⁶ *Ibid.* art. 2.

¹⁷ Cf. Ch. V., Note 48.

for example, is considered by Pound to be a wise bit of social engineering, a way of securing more interests. For Ihering property is a part of personality extended to things.¹⁸ To speak of property in terms of interest, is for him, a degeneration of the proper sense of property and a denial of its natural basis.¹⁹ In short, if one's knowledge of Ihering were limited to what can be gained from Pound it would be very inexact. In effect he has taken from Ihering only the terminology of 'interests' and given it an altogether different meaning.

It has already been seen that where Géný speaks of science and technique as necessary to law Pound takes only the elements of technique as though that were all that was mentioned by Géný. Géný is the foremost natural-law legal scholar in France, and it would be an injustice to him to intimate that he extolls technique over science in law. But there is nothing to be gained by multiplication of examples. This method of citation is destined only to deceive. The use of convenient texts does not in any considerable extent change the essential pragmatism of Pound's legal theory.

2. PHILOSOPHICAL CRITIQUE

A philosophical critique of Pound's legal theory is much more difficult since there is very little of philosophy to be found therein. This is not intended as a harsh criticism since he makes no great pretense at philosophy and very aptly refers to his theory as sociological jurisprudence. Nevertheless there are fundamental pre-suppositions, the lack of which is itself a matter of investigation in legal theory.

¹⁸ Ihering, *Der Kampf Ums Recht*, p. 40: "Das Eigenthum ist nur die sachlich erweiterte Peripherie meiner Person. Dieser Zusammenhang des Rechts mit der Person verleiht allen Rechten, welcher Art sie auch seien, jeden incommensurablen Werth, den ich im Gegensatz zu dem vom Standpunkt des Interesses aus habe, als idealen Werth bezeichne."

¹⁹ *Ibid.* "Das einzige Motiv, das mich bei der rechtlichen Behauptung des Vermögens zu leiten hat, ist dasselbe, welches mich bei dem Erwerb und der Verwendung desselben bestimmt: mein Interesse — ein Process um Mein und Dein ist eine reine Interessenfrage."

Ich meinerseits kann in einer solchen Auffassung vom Eigentum nur eine Entartung des gesunden Eigentumssinnes und den Grund davon nur in einer Verschiebung der naturgemässen Verhältnisse des Eigenthums erblicken."

With Pound the difficulty is made greater by reason of his extraordinarily loose use of language and distrust of, or disrespect for, logic. One well known American professor of law was almost driven to despair when he could not understand the legal Realists. But he felt relieved to learn that Pound could not understand them, nor could they understand him.²⁰ The fact is, he rarely makes a statement of consequence without surrounding it with so many qualifying and conditional phrases that one wonders at the end if he is speaking or quoting. However, even with the lack of logic and loose language a few notions do emerge distinctly.

a. Definition of Law

It has already been noted in the second chapter that Pound gives various descriptions of law but never arrives at a precise definition. Each of the descriptions reveals something of his philosophy of law but no one of them, nor even all of them taken together, gives a clear notion of what he means by law. Nevertheless, by considering not only the descriptions of law which he gives, but also the various meanings of law which he criticizes, one can gain a clearer concept of what he himself understands by law.

Thus Pound criticizes the ancient jurists because, he submits, they considered the purpose of law to be the maintenance of peace. It is, therefore, clear that for Pound law is not an instrument for securing and maintaining peace in society.

Likewise he criticizes Aristotle and the Scholastics for holding that the end of law is the maintenance of the *status quo*. The historical dubiety of this point has already been indicated. But from his criticism of this alleged purpose it is clear that for Pound the end of law is not the preservation of the existing order in society.

On the other hand, he says, using Ihering's system of social interests, that law is not in the person but in society. It is clear that for Pound law and rights are not in the person. In each person there are only interests which he seeks to have recognized. Only when the interests are recognized can we speak of rights. Each individual seeks his own proper good by pressing for the recognition of his interests.

²⁰ Lucey, F. E., S.J., "Natural Law and American Legal Realism," in 30 *The Georgetown Law Journal*, pp. 493-94.

Likewise Pound takes from Géný the element of technique. It has already been pointed out that for Géný, who is the foremost representative of natural law among French jurists, the element of technique is always secondary to the science and is at the service of science to realize the ends which the science of law proposes. But, as interpreted by Pound, the technique of Géný becomes a means of attaining an order of peace among those who seek to satisfy their own interests.

Taking the various descriptions which he gives and the criticisms of other jurists we see that, for Pound, law is a compromise imposed by authority in a society where each one seeks his own interests. This definition, however, has special qualities. It is not a pure positivist definition as, for example, we find in Kelsen. For Kelsen there is no recognition of personality but only pure law. For him the notion of law is derived purely from law as such, abstracting from any concept of personality or of any given society of persons. For Lauterpacht also law is defined as an instrument of order in a society with no consideration of the persons in the society or of the determined structure of the society. Del Vecchio also gives a definition of law in which he envisages a determined society but abstracts from the internal structure of the society.

For Pound, on the other hand, there is always a real element for he sees law as an instrument in a *free* society, a society in which he takes into consideration the liberty of all who seek their personal development. For this reason he is certainly not a positivist in the sense of Kelsen. We recognize here a realization of a demand of natural law, that is, that the definition of law must imply the real human nature, or a society of free men. Unfortunately, however, with Pound it is not human nature as universally given.

Despite this approach to natural law there is in his conception of law an element far removed from natural law, properly speaking. From Ihering he takes the notion of interests and develops it as though there were no rights in the person but only interests which struggle for recognition. It is thus clear that for Pound rights and law exist only in society and not in persons. Parenthetically, it might be said that there is a sense in which this is correct, for if there were only one person in the world there would be no law. For law formally exists as a relation among several free, moral subjects. Nevertheless, what exists before this formal law is more than a personal interest only. There is a real law realized in the

same nature of the several subjects, as we shall explain in more detail later. For Pound law is an instrument of organization in a concrete political society where each seeks his own interests. But according to natural law one can well imagine that before the State there is a society founded upon human nature as such. While it is true that in one sense society has a primacy over the individual, it is also true that man exists before the actual creation of the State and carries his personal rights into the State which he founds. The rights of the individual are not creations of the State, but, as Pound remarks regarding interests, they exist in the person independently of any state. Certainly, law always exists in any social organization. But this social organization precedes positive legislation being included in the social, not only individual, nature of man.

For this reason it is clear that Pound does not take *all* of human reality into consideration, although he does not abstract completely from human personality as do some other jurists. But since he does not consider all of human reality he remains outside the natural law concept of law and closer to the positivist definition.

b. Finality

Considering finality as it is found in law, Pound approaches the idealists and also, to a certain extent, the natural-law jurists. A philosophy of pure law, such as advocated by Kelsen for example, eliminates all finality and considers only the operation of pure positive law. Pound, on the contrary, introduces the notion of finality into his conception of law.

However the notion of finality with which Pound is concerned tends to confuse juridical politics and the finality of law itself. What he is really concerned with is the finality as found in juridical politics. In this sense all idealists, such as Stammler and Del Vecchio, admit a finality. But juridical politics is not law; it does not establish a juridical order. It is rather the antecedent effort to establish a juridical order. In the juridical order itself Pound does not admit of a finality but rather of a conflict of competing interests which seek for recognition. The order which he imposes is not, therefore, a juridical order.

In the theory of natural law, on the other hand, man with all his rights is social. And we must consider the complete nature of man as he is known in Ethics as a member of a social community

with a task to perform, not merely as he is known by social psychology as an intelligent being who has interests he wishes to satisfy. Finality as understood by natural law is imposed by the very nature of man as a social being who must by nature seek the common good. This finality is itself juridical and not merely ethical in the modern sense of individual ethics, and it creates law by itself prior to and independently of positive legislation.

Some might object that this theory that a determined finality is the first principle of the legal order, that it creates law, favors dictatorship in the formation of law, as for example Nazism. With Pound's theory, they would add, this danger is absent because there is no predetermined finality but only juridical politics in a determined society.

To this objection we reply that it is clear that juridical finality could be abused and made to serve the end of totalitarianism. To avoid this danger we must create barriers and also have recourse to a certain individualism. This individualist principle of order is found in natural law and as a juridical principle. Natural law does not say that any finality is juridical. If that were the case then it would be true that the objectives proposed for itself by any determined political regime would have the power to create law. But only that finality which corresponds to human nature has the power to create law. Therefore the principle cannot serve the ends of any form of totalitarianism. On the contrary it is the surest protection against absolutism, for it insists that finality as found in human nature not only creates law but also renders morally and *juridically* void any positive legislation contrary to that finality. In Pound's theory, on the other hand, this protection is absent because there are no rights in the person but only interests which are recognized by political authority. It follows, if there are no higher norms, that the authority which granted recognition to certain interests could likewise withdraw that recognition.

With our conception of finality we can resolve questions of law where there is no positive determination. For Pound, on the other hand, these questions can only be resolved by a compromise of conflicting interests. If understood properly his principle is not entirely false because interests, in so far as they are conformed to human nature, are a principle of order. But experience demonstrates that not every interest which men seek to secure is conformed to human nature. Because interests which are in conform-

ity with human nature are a principle of order, Christian theory of natural law has always supported the principle of subsidiarity as a juridical principle. According to this principle individuals seek to satisfy their own interests in an order which is conformed to nature and which seeks first the Common Good. This cannot be identified with Pound's theory of interests, which are not and cannot be juridical principles.

c. Norms

The most important part of Pound's philosophy of law gives an occasion to discussion of his conception of norms. Actually he has no juridical norms in the strict sense. What he admits as similar to norms are the interests of the citizens organized in a political society. Peace and order are to be realized in this society not according to any superior norms but only according to the different wills.

To be sure there is some rule, some norm, that is, freedom. But this freedom has no determined content. The content, the manner, of this freedom is in continuous evolution depending on the decision of the citizen. The concept of freedom as a rule is, therefore, similar to a categorical concept of Kant, without any determination. Nevertheless we have to recognize that Pound, by underlining individual freedom, is in no way in agreement with the neo-Kantian, Kelsen, for whom there is nothing determined by the concept of law. For Kelsen Russian law would be law in the same way as American law. Pound's doctrine of freedom, on the contrary, determines the concept of law in a restricted sense, though he does not admit any determination for this freedom.

Here the doctrine of natural law proceeds by determining the freedom of man according to a really strict norm, that of human nature. And in this manner we come to an ethical concept of norms, that is a norm imposed as an ideal for everyone. For human nature is not only a norm for the individual man; it is the same for all of humanity. Thus human nature becomes a principle for organizing every human society. This doctrine is enormously important, as P. A. Verpalen demonstrated in a special research regarding the doctrine of St. Thomas.²¹

²¹ Der Begriff des Gemeinwohls bei Thomas von Aquin; Sammlung Politeia, VI, Heidelberg, 1954.

But this doctrine of natural law as an ethical norm of society provokes a delicate question, that is, whether this norm must be rigorously and rigidly applied to society. The difficulty is evident. When we have to apply ethical norms to society in the same way as to the individual man there is no more freedom for each man in the sense that his own discretion and arbitrariness be the norm of social organization and social engineering. There only the objective truth, which is imposed on everybody, is a norm. Here one could speak of a dogmatic function of law, settled by an authority like divine authority. But where is this infallible authority? Contemporary society no longer acknowledges such an authority, as it was in medieval times when Christian faith was the foundation of all social action. Modern society has no common conscience. On the contrary, human conscience has disintegrated to the point where there are as many consciences as there are human beings.

For this reason we are forced to regulate social order according to the principle of individual freedom. Otherwise there would be no order. Or should we, perhaps, regulate it according to authoritarianism? This is excluded by reason of the fact that no human authority can guarantee to conduct human society in a really objective sense. Therefore authoritarianism must always remain a social or political system opposed to ethical norms.

We come, apparently, to the same conclusion proposed by Pound: individual freedom is the rule for social engineering. That much is certainly true. But there is a great difference. Our conclusion is really a conclusion, that is an application of ethical principles. According to our principle there is not simply individual freedom but freedom absolutely subjected to objective truth. Only in the application can we agree that individual freedom can be recognized as a rule of order.²² And even in this we can never abandon the ethical demand that the juridical order, in so far as it is possible, must constantly seek the absolute truth. For, according to the doctrine of natural law, there exists in every man a certain general knowledge of ethical demands. It is for this reason, for example, that after World War II it was possible to punish war criminals.

It appears that Pound supposes this general knowledge of ethical

²² Utz, A. F., cf. Utz, *Recht und Gerechtigkeit*, Heidelberg, Gemeinschaftsverlag, 1953, pp. 564-571.

demands in saying that apart from freedom there is another norm, that is 'civilization.' However it is not clear what he means by this term. Like freedom, this concept of civilization is, with Pound, evolutionary and devoid of any determined content. Nevertheless, this conception seems to approach the above mentioned idea of a general knowledge of ethical demands. However, this is an interpretation which may not have been Pound's when he speaks of 'civilization.' Because the term as used by him is vague and used to denominate a future possible it cannot serve as a juridical norm. To summarize, Pound attempts to build a juridical system without any juridical norms.

CHAPTER VII

CONCLUSION

In the preceding chapters we have seen briefly, but in its essential elements, the legal philosophy of Roscoe Pound. For him law is a process of social engineering, a process of adjusting and compromising conflicting claims so that the maximum of human interest may be satisfied with a minimum of friction and waste. The philosophical foundations of Pound's legal theory is essentially pragmatism; law is defined in terms of function. Natural law and philosophy are admitted as supplying ideal norms which may be used as a critique of existing law or to formulate positive laws, but they are not admitted as juridical norms. Natural law, in the Thomistic sense, is rejected chiefly because it is not known. When Pound speaks of natural law he is referring to later concepts of the seventeenth and eighteenth centuries.

Pound's legal theory is radically deficient because he attempts to create a legal order without juridical norms. Although he speaks frequently of absolute norms of justice, in reality he does not admit of such norms or he confuses them with social or cultural norms. As is evident from his use of the jural postulates, the law should be designed to meet the reasonable expectations of the society of the time and place. The law then is, for him, an instrument for ordering social life in a determinate society, something which is wholly foreign to the absolute norms of natural law of which St. Thomas speaks. Pound speaks of morality in the law, but on these principles it

could be only a morality born of the social conscience of the time and place. A Thomist could not admit such a norm of morality. For a Thomist human nature is the principle not only of individual ethics but also of social ethics, of which legal philosophy forms a part. The legal order must, therefore, enforce a moral conduct which is objective and not born of a particular social or cultural conscience.

In practice, however, it is extremely difficult to change an established legal system and theory. If the norm for jurisprudence is to be the individual will, then the task that faces the Scholastic legal scholar is one of juridical politics. That is, the individual conscience must be so formed that what each one will corresponds with what he should will. The principle that the individual will provides the ultimate norm for a legal system can provide the basis for a stable social and legal order only when the individual will is perfectly subjected to the objective norms deriving from human nature. Admittedly it would be difficult to the point of impossibility to form the conscience of all so that they corresponded exactly with objective norms of human action, but if a majority, or even a large number, of the citizens were so formed then their desires would be reflected in laws more in conformity with the demands of natural law.

In the practical order one of Pound's constant concerns has been to avoid any form of absolutism in government. To this end he insists that we must have absolute norms of values. For if the ideals are absolute, he says, it puts something above the ruler or ruling body, something by which to judge them and by which they are held to rule. Yet it is impossible for Pound himself to have absolute ideals of justice. Based as it is on a theory of social interests, his measure of values must necessarily be relative and also must necessarily be constantly changing and adjusting to the needs of the time and place. Further, since this theory of interest admits of no absolute rights but only interests that have been recognized by the political force of the society, it follows that the political force that granted the recognition can likewise withdraw its recognition. Thus the individual is left without any rights that owe their existence to his nature. The interests of the individual are enforceable only if and to the extent that they are recognized by the political force of the society. It is evident, therefore, that the very thing that Pound is most anxious to avoid is rendered more easily possible and

the door is left open to absolutism in government. Only when there is recognition of rights based on human nature is freedom guaranteed.

Besides the juridical politics mentioned above there is yet another way that Scholastic philosophers and legal scholars can exercise an influence in the accepted schools of jurisprudence. It has been seen that Pound draws his materials from the most diverse sources. Although this does not alter his fundamental pragmatism, it does offer an opportunity to modern Scholastics to exercise an influence even within the framework of pragmatic legal theory. At the present time there is in America a decided dissatisfaction with the reigning legal theory. Jurists, and Pound among the first, are calling for legal philosophy to direct the new movement. In the past jurists have rejected natural law theories because they have been confronted with pseudo theories. The task for Scholastics is to present the authentic natural law and allow it to be judged on its own merits.

Another strong movement which can be noticed among American jurists is a sentiment for codification of the law. If such a move should come it would not necessarily destroy the common law technique, but it would give a greater stability to the law. Modern Scholastics must be prepared to present the traditional Thomistic doctrine of law. The time is ripe and the sentiment is well disposed for it to be received into the law.

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